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No. 92-

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1992

GREGG FITZGERALD BAILEY,

Petitioner,

v.

BOARD OF COUNTY COMMISSIONERS
OF ALACHUA COUNTY, FLORIDA,
NATE CALDWELL, COLLEEN HAYES,
TOM L. ALLISON, STEPHEN GARRAHAN,
JAMES STRAUSS AND GARY BROWN

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

JOSEPH W. LITTLE
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Gainesville, FL 32605
904 392-2211
Attorney for Petitioner

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QUESTIONS PRESENTED

I. MAY GOVERNMENTAL OFFICIALS WITH LEGAL IMPUNITY TO ACTIONS UNDER 42 U. S. C. §1983 CAUSE A PERSON KNOWN TO THEM TO BE INNOCENT TO BE ARRESTED, JAILED, AND PROSECUTED ON FALSE CHARGES BY PERMITTING A TRAP TO BE SET UP FOR HIS ARREST IN WHICH IT REASONABLY APPEARS TO THE ACTUAL ARRESTING OFFICER THAT THE INNOCENT PERSON IS GUILTY OF A CRIME THAT THE GOVERNMENTAL OFFICIALS KNOW HE DID NOT COMMIT?

II. IS THE LIABILITY OF LOCAL GOVERNMENTAL ENTITIES UNDER 42 U.S.C. §1983 LIMITED SOLELY TO OCCASIONS IN WHICH THE ULTIMATE POLICYMAKING AUTHORITY SUCH AS A BOARD OF COUNTY COMMISSIONERS HAS ITSELF ADOPTED A SPECIFIC POLICY TO DEPRIVE CONSTITUTIONAL RIGHTS?

III. MAY GOVERNMENTAL OFFICIALS WITH IMPUNITY TO LIABILITY UNDER 42 U.S.C. §1983 SUMMARILY DEPRIVE A PUBLIC EMPLOYEE OF PROPERTY IN HIS PUBLIC EMPLOYMENT WITHOUT NOTICE, WITHOUT HEARING, AND WITHOUT PAY MERELY BECAUSE THE EXACT FACTUAL SITUATION HAD NOT BEEN CONFRONTED BEFORE?

IV. MAY A CIRCUIT COURT OVERRIDE THE CUSTOMARY DEFERENCE AFFORDED DISTRICT COURT RULINGS ON CHALLENGES FOR CAUSE AND REVERSE A 42 U.S.C. §1983 VERDICT FOR A CLAIMANT ON THE GROUND OF JUROR BIAS IN THE COMPLETE ABSENCE OF EVIDENCE OF ACTUAL BIAS AND IN THE PRESENCE OF AN EXTENSIVE VOIR DIRE EXAMINATION OF THE JUROR IN QUESTION WHO HAD VOLUNTARILY DISCLOSED HER VAGUE KNOWLEDGE OF ONE OF THE PARTIES AND REPEATEDLY DENIED BIAS IN MODERATE AND CAUTIOUS REPLIES TO THE DISTRICT COURT'S VOIR DIRE QUESTIONS?

PARTIES TO THE PROCEEDINGS BELOW

In addition to the parties named in the caption, the parties to the proceedings below included State Attorney of the Eighth Judicial Circuit of Florida, in his individual and official capacities, L.J. "Lu" Hindery, Sheriff of Alachua County, Florida, in his individual and official capacities, City of Gainesville, Florida, John Stanton Tileston, Sr., Farnell Cole, Charles Jerkins, Spencer Mann.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

Petitioner Gregg Fitzgerald Bailey respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Eleventh Circuit entered on March 31, 1992.

OPINIONS BELOW

The opinion of the Court of Appeals (Appendix A, infra, 1a) is reported at 956 F.2d 1112. There was no reported opinion of the United States District Court for the Northern District of Florida; its unreported pretrial order ruling on various pre- trial motions is reproduced as Appendix B, infra 1b.

JURISDICTION

The judgment of the Court of Appeals was entered on March 31, 1992. A timely Petition For Rehearing was denied on June 1, 1992. The jurisdiction of this Court is invoked under 28 U.S.C.A. §1254(1)

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Section I of the Fourteenth Amendment provides: "nor shall any State deprive any person of life, liberty, or property, without due process of law."

The Civil Rights Act of 1871, 42 U.S.C. §1983 (1982), states in pertinent part:

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State * * *, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

STATEMENT OF THE CASE

A. SUMMARY OF PROCEEDINGS:

BAILEY sued numerous Defendants on civil rights and state law actions arising out of an alleged unconstitutional arrest and sued others for unconstitutional deprivation of property interests in his

public employment by the actions taken after the arrest. The jurisdiction of the District Court of the Northern District of Florida was invoked under the jurisdiction of "all civil actions arising under the Constitution, laws, or treaties of the United States" conferred by 28 U.S.C. §1331. By summary judgments and directed verdicts, the District Court dismissed all state law counts and all §1983 counts pertaining to the arrest. The District Court dismissed Defendants COLE and ALLISON from the action on the grounds of qualified immunity and also dismissed all actions arising out of the initial May 14, 1987 summary suspension of BAILEY from his public job without notice, hearing and pay.

After the close of the evidence at the conclusion of the five-week trial, the District Court dismissed all remaining §1983 claims against all defendants based

on unconstitutional deprivation of liberty on the ground that the officer that actually made the arrest had probable cause. The Court denied BAILEY's motion to hold COUNTY liable as batter of law for the unconstitutional job deprivations various COUNTY officials had caused him. Three issues were submitted to the jury against Defendants COUNTY, CALDWELL and HAYES. Did they unconstitutionally deprive BAILEY of a property interest in his job by actions taken after the initial suspension without pay? Did they unconstitutionally deprive BAILEY of a name clearing hearing? And, damages? The jury returned a verdict in favor of COUNTY on all counts, against CALDWELL and HAYES on all counts, and assessed damages at $2.18 million.

After the verdict was returned, BAILEY renewed his motion to hold COUNTY liable as a matter of law for the wrongful acts

of CALDWELL and HAYES that deprived him of property without due process of law, and CALDWELL and HAYES renewed motions for qualified immunity and made other motions to attack the verdict. All these motions were denied.

BAILEY appealed some of the directed verdicts, the dismissal of ALLISON on summary judgment, the dismissal of the deprivation of property actions arising out of the May 14 summary suspension without notice, hearing, or pay, and the District Court's refusal to hold COUNTY liable as a matter of law for the unconstitutional job actions the jury found CALDWELL and HAYES took against BAILEY. CALDWELL and HAYES appealed the denial of their motions for qualified immunity and attacked the jury verdict on grounds of insufficient evidence, alleged juror bias, failure to sever the trial, and refusal to instruct the jury

specifically not to give damages for false arrest.

The Circuit Court affirmed all directed verdicts against BAILEY as to the arrest, reinstated ALLISON as a defendant, and denied BAILEY's appeals to hold COUNTY liable as a matter of law and to reinstate the action arising out of the May 14 suspension without notice, hearing and pay. It overturned the name clearing verdict against CALDWELL and HAYES; denied their appeal for qualified immunity as to post-arrest job deprivations; denied their appeal that the evidence did not support the verdict; granted their appeal as to juror bias; and granted their appeal as to error in the damage instructions.

B. STATEMENT OF FACTS NECESSARY TO ARGUMENT OF THE ISSUES:

On May 14, 1987, Plaintiff BAILEY was a permanent employee of Defendant ALACHUA COUNTY, Florida and assigned as a

corrections officer at the Alachua County Detention Center (ACDC). CALDWELL was COUNTY's Director of ACDC and Public Safety Director; HAYES was COUNTY's Personnel Manager; ALLISON was COUNTY's Assistant and/or acting ACDC Director; and BROWN, GARRAHAN and STRAUSS were ACDC officers. All were BAILEY's superiors at ACDC or in the county hierarchy.

In the period December 1986 through February 1987 ACDC inmate Jerkins made several improper overtures to BAILEY about getting out of jail. BAILEY immediately reported each overture to STRAUSS, his supervisor, and asked for instructions. In February, BAILEY wrote ACDC security chief GARRAHAN and asked to meet with him about improper inmate contacts. GARRAHAN gave BAILEY's letter to STRAUSS and told him to deal with it. STRAUSS told BAILEY to ignore the inmate (Jerkins) and BAILEY had no more contacts with him until the

occasion of his arrest described below.

In April 1987 Jerkins and another inmate coerced trustee inmates Tribuani and Sartore to smuggle hacksaw blades to them. While under the direct supervision of STRAUSS, Tribuani and Sartore stole hacksaw blades from the ACDC maintenance room and smuggled them to Jerkins. Jerkins attempted to saw out of the jail, but the attempt was foiled on April 22, 1987.

BROWN investigated the escape attempt and determined exactly how it occurred. Tribuani and Sartore were charged with the crime and gave sworn confessions describing in detail exactly where and how they got the blades. They never implicated BAILEY, and Sartore testified at trial that BAILEY had nothing to do with the escape attempt. BROWN prepared a complete written report, including the confessions, describing exactly how the

episode occurred. BAILEY was not implicated.

As a result of his attempted jail break, ACDC officials moved Jerkins to a secure cell block with few amenities. Soon thereafter, Jerkins began to make vague allegations to BROWN that a prison guard "might have been involved" and asked to be moved to a more amenable cell block and for help with his sentences. Jerkins was a known drug addict and a repeated and dangerous felon. ACDC officials contacted the state attorney who assigned investigator TILESTON to investigate Jerkins' allegations. Jerkins told TILESTON that BAILEY might have been involved and TILESTON devised a plan to trap BAILEY. For unexplained reasons BROWN did not provide TILESTON his written full report of the April 22 escape attempt (956 F.2d 1115, n.1) either before or after BAILEY was arrested, despite the

fact that BROWN took a direct part in setting up the trap to arrest BAILEY and was present at the time of arrest. Furthermore, although STRAUSS took a direct part in the operation to trap and arrest BAILEY and had critical evidence that exonerated BAILEY, STRAUSS did not disclose this information to TILESTON or the prosecuting attorney either before or immediately after BAILEY was arrested. GARRAHAN had exonerating information that he did not disclose either before or after the arrest. GARRAHAN, BROWN and STRAUSS were all commissioned officers and all were BAILEY's superiors at ACDC. Major GARRAHAN was Chief of Security and Lieutenant BROWN was especially assigned to coordinate the arrest operation with TILESTON.

Under TILESTON's plan, which CALDWELL and ALLISON approved, Jerkins was moved to a cell BAILEY was assigned to guard, was

bugged with a listening device, and given $500 in cash. Jerkins was told to engage BAILEY in incriminating conversation and give him the $500. TILESTON would then arrest BAILEY. This was to occur on the shift that began at 11:00 P.M. on May 13, 1987 and ended at 7:00 A.M., May 14. On the afternoon of May 13, Jerkins was taken out of his cell, telephoned BAILEY at his home, and told BAILEY he had something he wanted BAILEY to take out of the jail for him that night. In the late evening of May 13 at about the time BAILEY reported for work, STRAUSS placed the bug on Jerkins and delivered him the $500 to give to BAILEY. Moments later BAILEY came to work and stopped STRAUSS in the ACDC hall. BAILEY reported to STRAUSS about the telephone call he received from Jerkins, and asked STRAUSS for instructions. STRAUSS told BAILEY to "get physical evidence" and that he (STRAUSS) would tell

security. Despite knowing about the plan to trap BAILEY, STRAUSS did not report BAILEY's report to him to anyone. Instead, STRAUSS left ACDC for the night and did not inform TILESTON.

Although they monitored the bug all night, Defendants TILESTON, BROWN AND COLE heard no incriminating statements from BAILEY from the bug placed on inmate Jerkins. At about 6:21 A.M. on May 14, Jerkins called BAILEY to the cell block door and handed him a sock. BAILEY took the sock, saw a wad of bills inside, and dumped them onto a paper in the drawer of the guard's desk in the ACDC hall. Under the law and jail regulations, money in Jerkins' possession was contraband and the law required BAILEY to seize it but prescribed no specific reporting procedure. All Defendants knew that the money in Jerkins' possession was illegal contraband and that the law and ACDC regulations and training all required

BAILEY to seize it immediately. BAILEY immediately telephoned to two separate supervisory offices for help and received no reply. BAILEY then observed trustee inmates approaching the unlocked desk where he had placed the money as they brought breakfast carts to the cell blocks. To safeguard the seized contraband, BAILEY carefully wrapped the wad of bills in the paper he had dumped it on and placed it in his pocket. He then supervised the inmate trustees as they fed prisoners.

In the meantime, Jerkins signaled BROWN that he had transferred the money to BAILEY. Between 6:26 and 6:30 A.M., TILESTON, COLE and BROWN accosted BAILEY at his work station while he was busily at work, arrested him and charged him with aiding the April 22 escape. BROWN was present and said nothing about his exculpating report. STRAUSS soon returned

to work, but did not inform TILESTON of his knowledge of BAILEY's innocence. At trial, TILESTON testified that he would have done things differently if he had possessed this information. BAILEY was incarcerated and remained in jail for four days. After the arrest, TILESTON conducted additional inquiries that confirmed that BAILEY had nothing to do with the escape attempt. Several weeks later, the prosecuting officer, who was TILESTON's superior officer, filed charges of bribery and possession of contraband against BAILEY, but never charged him with the arresting offense, i. e., aiding the attempted jail break. All charges were dropped after several months.

Shortly after he was arrested on May 14, 1987, BAILEY was handed a letter dated May 13 and signed by ALLISON. The letter summarily suspended BAILEY from his public job without notice, without hearing, and

without pay as of 7:00 A.M. on May 14. This letter gave BAILEY 15 days to restore the "prerequisites" of his employment. CALDWELL and HAYES had approved the arrest plan and this letter. COUNTY stopped BAILEY's pay immediately, has never paid him, and has never given him a hearing. By a second letter dated May 26, 1987, ALLISON again wrote BAILEY to inform him without notice and hearing that "effective today you are placed on suspension without pay until further notice." (e.s.) This letter was also approved by CALDWELL and HAYES.

All criminal charges against BAILEY were dropped on November 19, 1987. On that date BAILEY wrote CALDWELL and asked to be reinstated with back pay and for a hearing if his request was denied. BAILEY also asked CALDWELL to inform him how to make a proper request for hearing if his letter was not satisfactory. CALDWELL never

answered BAILEY'S inquiries, but instead gave BAILEY's letter to ALLISON. Thereafter, with CALDWELL and HAYES' approval, ALLISON wrote BAILEY on December 7 and denied his requests for reinstatement and hearing. In June 1988, COUNTY ordered BAILEY back to work. In the meantime, BAILEY was receiving psychiatric treatment for injuries caused by these events and was advised by his physician not to return to active duty at present. On June 21, 1987 BAILEY suffered an extreme psychotic break and was hospitalized in the secured psychiatric unit of Shands Teaching Hospital in Gainesville for several weeks. The unrefuted medical testimony was that the actions of the Defendants, including the post arrest actions, caused BAILEY severe permanent psychiatric damage and that BAILEY's prospects of recovery are poor.

On the first day of the four-week trial,

potential juror Johns volunteered this response to the District Court's voir dire inquiries:

> "I don't know Mr. Bailey [the Plaintiff] personally but I am aware of him through our mutual connection in Shands Hospital where I am employed." (R. 201 569 -50).

Potential juror Johns stated that she knew about BAILEY's stay in the hospital "only in the very broadest sense" and "I don't know anything in particular about him." (R 20-569 - 51-52). The District Court then made these further inquiries of Johns: Whether any outside knowledge would affect her decision? Whether she could assure the District Court that her decision would not be based on outside knowledge? Whether she would base her decision on what she saw and heard in the courtroom? And whether she would be fair to the Defendants? Johns replied "I don't feel so," "Yes, I think that's true;" "Yes, I feel that's true;", and "I think so." (R 20-569 - 51-52). Thereafter, jury

selection began.

Knowing what Johns had stated to the District Court, Defendants used up their peremptory challenges and moved to strike her for cause. The District Court then re-questioned Johns at side bar about what she knew of BAILEY. She replied:

> "I'm aware that he was an inpatient at Shands." (R-20-569-118).
>
> "No, I know of nothing about him; just that he was a patient."
>
> "I did see him on the unit."
>
> "I didn't know his name." "
>
> I just know his face when I saw him."
>
> "I knew nothing [of his history].
>
> "[I know nothing of his complaints] except that he was in a specialized unit."
>
> "He is an employee of Shands. I've seen him there."
>
> "I don't know specifically what he does. I've seen him in the area of hospital stores, that sort of thing." [R 20-569-118].

In reply to the District Court's inquiry as to whether any of this would make a

difference, Johns replied:

> "I don't believe so but I'm not quite sure. I'm not the one to make that decision."
>
> "I have no personal connection at all." (R 20-569-119).

As to names on the witness list, Johns volunteered:

> "I know many of these people through my employment, Dr. Serentino. A psychiatrist that you have listed, I am acquainted with. I am presently working in the same arrangement with Dr. Alan Waldman. I think Dr. Bradley was a resident on our unit some years back. I know them through my employment." (R 20-569-86).

To the District Court's repeated questions as to whether her knowledge of these people would affect her verdict, Johns replied: "I don't think so." "I don't believe so." "I don't really see how it would." "I don't believe so." (R 20-569-107).

The District Court refused to exclude Johns, but the Circuit Court overturned the jury's verdict on the ground of juror bias.

REASONS FOR GRANTING THE WRIT

QUESTIONS I, II AND III PRESENTED BY THIS CASE SHOULD BE SETTLED BY THIS COURT, BECAUSE OF THE EXCEPTIONAL RISK THAT THE LEGAL STANDARDS APPLIED BY THE CIRCUIT COURT WILL PERMIT LOCAL GOVERNMENTS AND GOVERNMENTAL OFFICIALS TO VIOLATE THE FOURTEENTH AMENDMENT RIGHTS OF INNOCENT CITIZENS WITH IMPUNITY AGAINST THE INTENT OF 42 U.S.C. §1983 AND THIS COURT'S PRECEDENTS, AND QUESTION IV SHOULD BE SETTLED BY THIS COURT BECAUSE THE STANDARD OF REVIEW OF JUROR SELECTION DECISIONS APPLIED BY THE CIRCUIT COURT DIRECTLY CONFLICTS WITH PRECEDENTS OF THIS COURT AS TO THE ACCEPTED AND USUAL COURSE OF JUDICIAL PROCEEDINGS IN SUCH A MANNER AS TO THREATEN THE CUSTOMARY DEFERENCE ACCORDED DISTRICT COURTS IN MANAGING TRIALS AND INFRINGE THE RIGHTS OF LITIGANTS TO MAKE Peremptory JURY CHALLENGES AS THEY SEE FIT.

QUESTION I. MAY GOVERNMENTAL OFFICIALS WITH LEGAL IMPUNITY TO ACTIONS UNDER 42 U. S. C. §1983 CAUSE A PERSON KNOWN TO THEM TO BE INNOCENT TO BE ARRESTED, JAILED, AND PROSECUTED ON FALSE CHARGES BY PERMITTING A TRAP TO BE SET UP FOR HIS ARREST IN WHICH IT REASONABLY APPEARS TO THE ACTUAL ARRESTING OFFICER THAT THE INNOCENT PERSON IS GUILTY OF A CRIME THAT THE GOVERNMENTAL OFFICIALS KNOW HE DID NOT COMMIT?

As set forth above, the false arrest of BAILEY arose out of a multi-agency operation involving numerous governmental officials and entities. TILESTON, an

investigating officer for the state attorney, directed the operation and the Court below found that he arrested BAILEY. (956 F.2d 1112, 1119). The Court below also found that the arrest made by TILESTON was objectively reasonable, and, therefore, that TILESTON had probable cause to make the arrest. The objectively reasonable factors were: that TILESTON had been informed that BAILEY had taken the bait money from Jerkins; that nine minutes had elapsed and no report had been received from BAILEY (TILESTON did not know BAILEY had attempted two telephone reports without answer); and that BAILEY had the bait money in his possession. Among the exculpating information that TILESTON did not have at the time of the arrest was: the investigative report completed by BROWN that correctly determined how the April 22 escape attempt occurred and did not implicate BAILEY

(BAILEY actually disputes that TILESTON did not have this information but the Court below concluded without jury trial that he did not. 956 F.2d 1115, n.1); the numerous reports BAILEY had made to STRAUSS prior to the escape attempt; BAILEY's letter to GARRAHAN; GARRAHAN's instructions to STRAUSS and STRAUSS' to BAILEY; the fact that BAILEY had reported to STRAUSS on the evening before the arrest that Jerkins had telephoned him; that BAILEY had asked STRAUSS for instructions; and that STRAUSS had told BAILEY that STRAUSS would contact security and BAILEY should get physical evidence. (See 956 F.2d 1120, 1121).

Although BAILEY vigorously and earnestly disagrees with the holding that TILESTON had probable cause, based mainly upon hotly disputed inferences about what TILESTON truly knew about exculpating facts, the critical constitutional issues

raised by this petition are these: First, may governmental officials, with legal impunity to actions under 42 U.S.C. §1983, cause a person known to them to be innocent to be arrested and prosecuted on false charges by permitting a trap to be set up his arrest in which it reasonably appears to the actual arresting officer that the innocent person is guilty of a crime that the governmental officials know he did not commit? And, second, are these governmental officials legally immune to liability under 42 U.S.C. §1983 for such a false arrest when after the arrest has been made they do not come forward and disclose the exculpating information they possess to the actual arresting officer or the prosecuting officer?

These questions arise because of the unexplained rule of law applied by the Court below, namely. "If TILESTON had probable cause for the arrest, then these

Defendants did not violate BAILEY's Fourth Amendment rights against false arrest as protected through §1983." 956 F.2d 1119. Again, at 956 F.2d 1121, the Court below concluded: ". . . we agree that TILESTON had probable cause to arrest BAILEY and we affirm the District Court's final judgments for all Defendants with respect to all of BAILEY's arrest-related claims." (e.s.) Despite the fact that BAILEY specifically raised these issues on appeal, the Court below did not explain or discuss why the Defendants, whom a jury could find knew BAILEY to be innocent, namely, BROWN, GARRAHAN, STRAUSS and COUNTY, were not liable for causing BAILEY to be deprived of his liberty without due process of law by withholding from TILESTON the information of BAILEY's innocence known to them before the arrest, and why these Defendants were not liable for causing BAILEY to be deprived of

liberty without due process of law by continuing to withhold this information from TILESTON and the prosecuting officer after the arrest and for the six-month period the prosecution continued.

BAILEY earnestly asserts that irrespective of whether or not TILESTON personally had probable cause to arrest him, that BROWN, GARRAHAN, STRAUSS and COUNTY all caused him to be deprived of liberty without due process of law and that the Court erred to hold that they were exonerated by the finding that TILESTON had probable cause. Accordingly, BAILEY respectfully requests this Court to grant the Writ to consider this vital issue of fundamental liberty under the Fourteenth Amendment that the Court has apparently never before considered.

QUESTION II. IS THE LIABILITY OF LOCAL GOVERNMENTAL ENTITIES UNDER 42 U.S.C. §1983 LIMITED SOLELY TO OCCASIONS IN WHICH THE ULTIMATE POLICYMAKING AUTHORITY SUCH AS A BOARD OF COUNTY COMMISSIONERS HAS

ITSELF ADOPTED A SPECIFIC POLICY TO DEPRIVE CONSTITUTIONAL RIGHTS?

The facts are unrefuted and undisputed that BAILEY was summarily suspended from his permanent public job with COUNTY on May 14, 1987 without notice, without hearing and without pay; that the suspension without pay continued without notice or hearing for a period of more than 13 months until BAILEY was ordered back to work and was unable to do so because of extreme psychiatric injury he had suffered; and, that COUNTY has not paid BAILEY back pay or accrued job benefits to this day. Moreover, it cannot be disputed that long before May 13, 1987 this Court had held that permanent public employees have a constitutionally protected property interest in their jobs, Board of Regents v. Roth, 408 U.S. 564, 92 S. Ct. 2701 (1972), 33 L.Ed.2d 548, and Perry v. Sinderman, 408 U.S. 593, 92 S. Ct. 2694 (1972), 33 L.Ed.2d 570 (1972),

and that the Constitution requires that a hearing be afforded before a person is deprived of a protected property without absent "extraordinary circumstances". Boddie v.Connecticut, 401 U.S. 371, 379, 91 5. Ct. 780, 786, 28 L.Ed.2d 113 (1971). Furthermore, in Cleveland Board of Education v. Loudermill, 470 U.S. 532, 105 S. Ct. 1487, 84 L.Ed.2d 494) (1985), this Court reiterated these constitutional principles and prescribed a specific course of action to protect the constitutional rights of persons such as BAILEY, namely: "Finally, in those situations where the employer perceives a significant hazard in keeping the employee on the job, it can avoid the problem by suspending with pay." (e.s.) 470 U.S. 544, 545, 105 5. Ct. at 1495.

BAILEY sued COUNTY, Personnel Manager HAYES, ACDC Director CALDWELL, and ACDC Acting Director/Assistant Director ALLISON

on the ground that they unconstitutionally deprived him of a protected property interest in his job without due process of law. Throughout the litigation HAYES, CALDWELL and ALLISON have pressed qualified immunity as a defense. The Court below held that these defendants had qualified immunity as to the claim arising out of the initial summary suspension without notice, without hearing and without pay but also held that they did not have qualified immunity as to the post-deprivation due process claims. (956 F.2d at 1125). These Defendants have filed a Motion For Stay Of Mandate in the Court below on the ground that they intend to petition this Court for Writ of Certiorari to have that issue reviewed. Furthermore, throughout this litigation COUNTY defended against the property deprivation claims on the ground that ALLISON, CALDWELL and HAYES were not final decision makers of

COUNTY in regard to the unconstitutional job actions they took against BAILEY. COUNTY's defense rests upon its assertion that the Board of County Commissioners sets personnel policies and that ALLISON, CALDWELL and HAYES were not making a policy decision when they deprived BAILEY of his rights.

In sum, BAILEY has been faced with these apparently conflicting defenses. ALLISON, CALDWELL and HAYES claim (or will claim) qualified immunity on the ground that COUNTY's personnel rules were not comprehensive and clear, and COUNTY claims it is not liable because the Board of County Commissioners has ultimate authority to set personnel policies.

The Court below correctly held that the qualified immunity issue as applied to ALLISON, CALDWELL and HAYES turns on whether the law stating that a person may not be deprived of his public job without

notice, without hearing and without pay was so well settled on May 13, 1987, May 26, 1987 and December 7, 1987 that a reasonable person would have known it. Hence, the Court was correct to deny the qualified immunity defense as to the post-deprivation claims, but, as asserted in Question III below, erred as to the predeprivation claims.

Nevertheless, the Court applied a rule of law to exonerate COUNTY that appears to undermine with this Court's ruling in Monell v. New York City Dept. Soc. Serv., 436 U.S. 658 (1978) that a local governmental entity may be actionable under 42 U.S.C. §1983, and plainly fails to comply with the test of final decision makers laid down in Pembauer v. City of Cincinnati, 475 U.S. 469 (1986), and City of St. Louis v. Praprotnik, 485 U.S. 112, 108 S.Ct. 915, 924, 99 L.Ed.2d 107 (1988). Specifically, this Court held in

Praprotnik that whether and to whom final decision making authority has been delegated is a matter of state law based upon the laws, ordinances, regulations and practices of the entity in question. Id.

Despite the fact that BAILEY moved the District Court to make the detailed legal analysis of COUNTY's Charter and Code and to hold COUNTY liable as a matter of law for the unconstitutional acts taken by ALLISON, CALDWELL and HAYES as final decisionmakers, the District Court declined to make the detailed legal analysis that Praprotnik requires but instead submitted the question of COUNTY liability to the jury without instructions about how to determine final decision making authority. The jury thereafter returned a verdict that CALDWELL and HAYES were guilty of depriving BAILEY of property without due process of law, but that COUNTY was not guilty. BAILEY moved

for judgment as a matter of law against COUNTY on the ground that CALDWELL and HAYES were acting as final decision makers. The District Court denied this motion, again without making the analysis of state laws, ordinances, etc. that Prapotnik requires.

On appeal to the Court below BAILEY presented a detailed analysis of COUNTY's Charter and Code, and testimony of all COUNTY Commissioners, the COUNTY Manager, ALLISON, CALDWELL and HAYES to demonstrate as a matter of law that COUNTY had delegated final, unreviewable discretion without specific guidelines to make personnel decisions pertaining to BAILEY on the occasion in question. In subsequent briefs on the merits, BAILEY will demonstrate that ALLISON, CALDWELL, and HAYES were final decision makers and COUNTY was responsible for their unconstitutional actions. For purposes of

this petition BAILEY summarizes the evidence as follows: COUNTY's Charter vests the executive powers of COUNTY in a COUNTY Manager (§21.3); COUNTY's Code vests the administration of each department (i.e. corrections [CALDWELL and ALLISON] and personnel [HAYES] in a manager appointed by the COUNTY Manager and confirmed by the Board of County Commissioners (Code §21.53); COUNTY's Code delegates to department heads and managers (i.e. CALDWELL, HAYES and ALLISON) authority to manage all personnel matters; each Board member testified that the Board exercised no review of the personnel matters pertaining to BAILEY; the COUNTY Manager testified that he exercised no control or review over personnel matters of the kind involving BAILEY and, specifically, exercised no review or control over BAILEY's case and that he delegated matters of this type to division

and department heads to manage without his review. CALDWELL testified that the COUNTY Department Head (i.e. CALDWELL, HAYES and ALLISON) made the final decision for COUNTY about personnel actions taken by COUNTY.

Neither the Court below nor the District Court made a detailed analysis of the detailed evidence presented to determine whether or not CALDWELL, HAYES and ALLISON were "final decision makers" of COUNTY in regard to the unconstitutional job actions they took against BAILEY. Instead, the Court below applied the following tests that raise the constitutional issues presented in this petition: "In this case, the record is devoid of evidence that either CALDWELL, HAYES or ALLISON had final policymaking authority for ALACHUA COUNTY's personnel policy. Testimony at trial was unequivocal that final policy making authority rested in the Board of

County Commissioners." (e.s.) 956 F.2d 1125.

The constitutional defect in the standard applied by the Court below is that it acknowledges delegation of decision making authority only at such a specific and formal level that local governments may with impunity delegate final decision making power through informal methods such as unwritten customs and practices. This, of course, is directly contrary to Congress' intention expressed in 42 U.S.C. §1983 as construed by this Court in Prapotnik and Pembauer. When the Court below states that the record is "devoid" of evidence of delegation, it plainly rejects consideration of the extensive and irrefutable evidence of delegation summarized above and did so without making any analysis of its legal effect. If the lower Courts apply this test generally,

the effect will be to eliminate Prapotnik and Pembauer as guardians against abusive unconstitutional actions by governmental entities through the myriad subtle way actions that governments routinely and regularly delegate final decision making authority to officials.

Furthermore, the Court's requirement for evidence to establish that "CALDWELL, HAYES or ALLISON had 'final policymaking authority' for ALACHUA COUNTY's personnel policy" apparently requires a wholesale delegation of authority to operational officials that one would rarely expect to find. The Court's meaning as to this point is explained by its very next sentence; i.e., "testimony at trial was unequivocal that final policymaking authority rested in the Board of County Commissioners." 956 F.2d 1125. BAILEY does not and never has disputed that all policy making authority of COUNTY under

the laws of Florida originates in and emanates from the Board of County Commissioners. This is analogous to saying that all policymaking authority of the State begins in the legislature. The question was and remains whether the Board's authority to take final unreviewable discretionary personnel action in the circumstances of this lawsuit had been delegated to CALDWELL, HAYES and ALLISON.

In short, the standard applied by the Court below is directly and plainly at variance with this Court's holding that "municipal liability under §1983 attaches where--and only where--a deliberate choice to follow a course of action is made from among various alternatives by the official or officials responsible for establishing final policy with respect to the subject matter in question." Pembaur, 475 U.S. 483, 106 S.Ct. at 1300. Hence, the issue

is not whether the governmental power to make a personnel policy for COUNTY is ultimately reposed in the Board; instead the issue is whether the Board has delegated the power to make the final discretionary decision "with respect to the subject matter in question" to subordinate officials such as CALDWELL, HAYES and ALLISON.

The general constitutional importance of this issue is highlighted by the facts of this case. No one can dispute that BAILEY was repeatedly deprived of his constitutional rights by wrongful, purposeful acts of CALDWELL, HAYES and ALLISON and that those unconstitutional acts caused him extreme and permanent injury. Nevertheless, a coupling of the test applied by the Court below to determine the liability of the governmental entity (COUNTY) under Monell plus the defense of qualified immunity

raised by the governmental officials (i.e. CALDWELL, HAYES and ALLISON), would threaten to eliminate 42 U.S.C. §1983 as a tool to remedy deliberate constitutional deprivations in many if not most cases of injury by unconstitutional act. For that reason, the issue raised by the standard of governmental liability applied by the Court below is one of exceptional importance to all citizens and deserves review by this Court.

QUESTION III. MAY GOVERNMENTAL OFFICIALS WITH IMPUNITY TO LIABILITY UNDER 42 U.S.C. §1983 SUMMARILY DEPRIVE A PUBLIC EMPLOYEE OF PROPERTY IN HIS PUBLIC EMPLOYMENT WITHOUT NOTICE, WITHOUT HEARING, AND WITHOUT PAY MERELY BECAUSE THE EXACT FACTUAL SITUATION HAD NOT BEEN CONFRONTED BEFORE?

As the Statement Of Facts sets forth, ALLISON, who was COUNTY's Assistant ACDC Director, wrote a letter dated May 13, 1987 and had it delivered to BAILEY shortly after Defendants arrested him on the morning of May 14, 1987. ACDC

Director CALDWELL and COUNTY's personnel manager approved this letter. Concurrently with the delivery of the letter, COUNTY stopped BAILEY's pay and he has yet to be paid any wages or benefits beginning May 14, 1987. As the Statement Of Facts demonstrates, this action was prearranged by these Defendants in connection with the plan to set a trap to arrest BAILEY.

Despite the long established law set forth in Roth, Sinderman, Boddie and numerous other decisions, the Court below held that CALDWELL, HAYES, and ALLISON were entitled to qualified immunity as to the initial May 14 summary suspension without pay on the ground that a reasonable official would not have known that the Constitution required that BAILEY be given a predetermination hearing or placed on suspension with pay. (956 F.2d 1126) The lower Court's decision appears to be in direct conflict with the

decisions referred to above and especially with the law firmly settled by Cleveland Board of Education v. Loudermill, wherein this Court stated in 1985, "An essential principle [e.s.] of due process is that a deprivation of life, liberty, or property be preceded [e. s.] by notice and opportunity for hearing appropriate to the nature of the case . . . . We have described the root requirement [e.s.] of the Due Process Clause as being 'that an individual be given an opportunity for hearing before [emphasis in original] he is deprived of any significant property interest.'" 470 U.S. 542, 105 S.Ct. 1493. Loudermill applied this rule to the suspension without pay of a security guard at a school, which seems constitutionally indistinguishable from a corrections officer at a jail, and, as noted above, instructed officials how to avoid violating this "root requirement" of Due

Process when impracticable to give predeprivation notice and hearing; namely, "it can avoid the problem by suspending without pay." 470 U.S. 544, 545, 105 S.Ct. 1495.

BAILEY respectfully asserts that the holding of the Court below departs from settled constitutional principles expressed by this Court's decisions and requires review by this Court to protect the constitutional rights of citizens such as BAILEY. This review is especially needed in a case such as this wherein BAILEY's rights were plainly violated by officials of COUNTY on May 14, 1987 but with complete immunity, first, because the Court below held that COUNTY was not responsible for the acts of CALDWELL, HAYES, and ALLISON (i.e., see Question II) and, second, because the Court below also held that CALDWELL, HAYES and ALLISON were entitled to qualified immunity.

QUESTION IV. MAY A CIRCUIT COURT OVERRIDE THE CUSTOMARY DEFERENCE AFFORDED DISTRICT COURT RULINGS ON CHALLENGES FOR CAUSE AND REVERSE A 42 U.S.C. §1983 VERDICT FOR A CLAIMANT ON THE GROUND OF JUROR BIAS IN THE COMPLETE ABSENCE OF EVIDENCE OF ACTUAL BIAS AND IN THE PRESENCE OF AN EXTENSIVE VOIR DIRE EXAMINATION OF THE JUROR IN QUESTION WHO HAD VOLUNTARILY DISCLOSED HER VAGUE KNOWLEDGE OF ONE OF THE PARTIES AND REPEATEDLY DENIED BIAS IN MODERATE AND CAUTIOUS REPLIES TO THE DISTRICT COURT'S VOIR DIRE QUESTIONS?

The trial in this case commenced on July 9, 1990 and ended August 6, 1990. Juror Johns was seated on the first day, rendering the entire fact finding process nugatory according to the Court below. 956 F.2d 1128, 1129. That this result, if unjustified under settled law, constitutes an irretrieval waste of judicial resources (not to mention the resources of the parties, witnesses, etc.) is obvious. What is not obvious is that the standard applied below to review the District Court's ruling on potential juror bias threatens to undermine the customary deference accorded District Courts in

making discretionary decisions on trial process matters. This especially includes jury selection, a process that rests in large part upon a judgmental evaluation of subjective factors such as candor, frankness and the like. The decision below also erodes the right of litigants, such as BAILEY, to exercise peremptory challenges as they see fit.

Because of the importance of this matter, BAILEY set out in detail in the Statement of Facts the voir dire examination the District Court made of juror Johns before denying the Defendants' Motion to exclude her for cause. BAILEY asserts that the decision of the Court below facially conflicts with this Court's rulings on the deference to be afforded to trial court juror selection decisions and the standard of review to be applied to them set down by this Court in Reynolds v. United States, 98 U.S. 145, 154-157, 8

Otto 145, 25 L.Ed. 244 (1878) , Patton v. Yount, 467 U.S. 1025, 1035-40, 104 S.Ct. 2885, 2891-2893, 81, L.Ed.2d 847 (1984), McDonough Power Equipment Company, Inc. v. Greenwood, 464 U.S. 548, 553, 104 5. Ct. 845, 849, 78 L.Ed.2d 663 (1984) and other decisions, and should be reviewed by this Court on that ground alone. More than mere failure to conform to the standards applied by this Court are at stake in this case, however, because of the larger issues involved.

As the statement of facts demonstrate, potential juror Johns forthrightly volunteered the existence and basis of her vague knowledge about BAILEY's treatment for his injuries in the University of Florida Shands Teaching Hospital where she worked and of her acquaintance with some of the physicians who were listed as potential witnesses. (Contrary to the Court's opinion at 956 F.2d 1128, Johns

did not know BAILEY; she merely "knew of" him, but did not know his name and knew nothing about him, his history and complaints). After the District Court's initial voir dire, juror selection commenced. Having observed the voir dire, Defendants knew what Johns had stated and knew her exact sequential position in the order of jury selection. Despite this knowledge, Defendants exercised all their peremptory challenges before potential juror Johns' turn came. Bailey exercised his last peremptory challenge on the prospective juror immediately preceding Johns in order of selection because he assessed Johns to be a better juror.

Having exhausted their peremptory challenges, Defendants challenged Johns for cause. The District Court then called her to sidebar and made the detailed voir dire summarized in the Statement of Facts. Based upon Johns' forthright and moderate

answers, her candor and demeanor, and other relevant subjective factors perceivable to him but not to a reader of a cold record, the District Court denied the Motion To Exclude. The standard of review applied by the Court below threatens to derogate the deference heretofore accorded by this Court to trial courts in determining juror selection issues and to press them to play it unnecessarily safe by excluding challenged jurors whom they believe to be open minded and unbiased and, perhaps, even unusually well suited to serve.

In addition, the standard of review applied by the Court below plainly derogates from the unfettered right of litigants such as BAILEY to exercise peremptory challenges without being manipulated unfairly. As noted above, Defendants had exercised all their peremptory challenges before Johns' turn

arrived. BAILEY struck the prospective juror immediately preceeding Johns and opposed Defendant's challenge of Johns for cause because he deemed it unjustified. After that strike, Johns was seated and completed the jury.

The standard of review applied by the Court below will force prudent litigants to operate differently in the future. Under that standard, if BAILEY is confronted with the same decision in the retrial of this case, prudence would require him to support rather than resist Defendants' challenge for cause of a potential juror Johns. Hence, he would be forced to advocate rejecting a juror he might prefer to have serve. Furthermore, prudence might also impel BAILEY to use a peremptory challenge to exclude any potential juror whom the Defendants might unsuccessfully challenge for cause. This, despite the fact that he preferred to have

the juror serve and, even worse, was saddled with a subsequently seated juror whom he would have struck if he could.

In short, BAILEY asserts that the Court below applied a standard of review that departs from this Court's precedents, derogates from the authority of District Courts to make judgmental juror decisions, and interferes with the rights of litigants to manage their own case tactics. For all these reasons, BAILEY respectfully urges this Court to grant the Writ and review this important matter.

CONCLUSION

When governmental officials participate in a trap to arrest and jail a citizen whom they know to be innocent of the charges against him, then these officials have deprived that citizen of liberty, without due process of law in violation of the Fourteenth Amendment and 42 U.S.C.

§1983. Despite this, the rule applied by the Court below grants those officials immunity to suit under 42 U.S.C. §1983 if the actual arresting officer had probable cause to make the arrest based upon the limited objective facts available to him, and does so despite the fact that the immunized officials had withheld from the arresting officer information of the arrested citizen's innocence known to them. This situation of governmental abuse of individual rights cries out for review by this Court. Similarly, the ruling that the officials are immunized by the arresting officers' probable cause for their failure to disclose their knowledge of the arrested person's innocence to arresting and prosecuting officers after the arrest, also cries out for review by this Court.

This Court has held that local governmental entities may be held liable

under 42 U.S.C. §1983 for deprivations of constitutional rights for which the entity is responsible. The decision below applies a standard of governmental entity responsibility that severely limits liability to situations in which the ultimate source of local governmental authority, such as a Board of County Commissioners, itself promulgates a specific policy to deprive constitutional rights and eliminates governmental entity liability for the myriad instances in which the ultimate source has delegated final decision authority as to specific matters to subordinate officials by custom, practice and incomplete policies. This rule threatens to undermine the capacity of 42 U.S.C. §1983 to restrain and remedy unconstitutional deprivations by local governmental entities in all but rare cases, despite the contrary decisions of this Court. This impunity further

threatens to leave victims of severe constitutional deprivations, such as BAILEY, with no remedy at all in instances in which the officials themselves can claim qualified immunity. In short, the decision below on delegation of decisionmaking authority severely erodes the check against unconstitutional abuses posed by 42 U.S.C. §1983 and needs review by this Court.

The holding below that COUNTY was not liable for the wrongful acts of CALDWELL, HAYES, and ALLISON when coupled with the further holding that CALDWELL, HAYES and ALLISON had qualified immunity to the action against them for summarily depriving him of his public job without notice and hearing and without pay on May 14, 1987, has denied BAILEY any remedy for plain and deliberate violations of his constitutional rights perpetrated by COUNTY's officials under a plan they

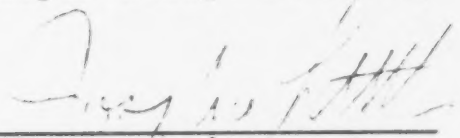
approved. The holding that these officials were entitled to qualified immunity for the actions they took on May 14, 1987 is contrary to this Court's plain precedents. This, in conjunction with the entire decision that no Defendant is liable for the unconstitutional wrong done on that date, calls for this Court's review.

The standard of review of juror selection decisions applied by the Court below departs from the accepted and usual course of judicial proceedings and is in conflict with this Court's precedents. That ruling calls for this Court's supervisory review in the interests of economizing judicial resources, preserving the customary deference accorded District Courts in making decisions that require judicious evaluation of subjective factors, and protecting the rights of litigants to employ their peremptory

challenges as they see fit.

For all these reasons the Petition For Writ Of Certiori should be granted.

Respectfully submitted,



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APPENDIX A

OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT MARCH 31, 1992

IN THE UNITED STATES COURT OF APPEALS,

FOR THE ELEVENTH CIRCUIT

March 31, 1992.

No. 91-3275

[956 F.2d 1112]

GREGG FITZGERALD BAILEY,
LIZZIE SHIRLEY BAILEY,

Plaintiffs-Appellants-
Cross-Appellees,

v.

BOARD OF COUNTY COMMISSIONERS OF ALACHUA COUNTY, FLORIDA, Eugene T. Whitworth, State Attorney of the Eighth Judicial Circuit of Florida, in his individual and official capacities, L.J. "Lu" Hindery, Sheriff of Alachua County, Florida, in his individual and official capacities, City of Gainesville, Florida, John Stanton Tileston, Sr., James Strauss, Farnell Cole, Gary Brown, Charles Jerkins, Tom L. Allison, Spencer Mann, Stephen Garrahan,

Defendants-Appellees,

NATHANIEL CALDWELL,
COLLEEN HAYES,

Defendants-Appellees,
Cross-Appellants.

ESCHBACH, Senior Circuit Judge:

Near the end of his graveyard work shift on May 14, 1987, Gregg Fitzgerald Bailey was arrested as the result of an undercover investigation at the Alachua County Detention Center (ACDC). Bailey had been a corrections officer (a prison guard) at ACDC since 1985. Based on his arrest and subsequent events, which included Bailey's suspension without pay from ACDC, Bailey and his wife (Lizzie Shirley Bailey) began this s 1983 action against two governmental entities (Alachua County and the City of Gainesville) and twelve individuals (Stephen Garrahan, James Strauss, Gary Brown, Tom L. Allison, John S. Tileston, Nate Caldwell, Colleen Hayes, Farnell Cole, Charles Jerkins, Spencer Mann, Eugene Whitworth and L.J. "Lu" Hindery) (collectively, "the defendants"). Most of the defendants exited this litigation either through

summary judgments or dismissal motions prior to trial or through directed verdicts at the close of testimony, leaving only three defendants (Caldwell, Hayes and Alachua County) to go to the jury on Bailey's then remaining claims. The jury returned a verdict in favor of Bailey against Caldwell and Hayes, awarding Bailey damages of $2,182,406. The jury exonerated Alachua County from liability. Bailey now appeals many of the summary judgments and directed verdicts as well as the jury's verdict for Alachua County; Caldwell and Hayes cross appeal the jury verdict against them. As discussed below, we affirm in part, reverse in part, and remand for a new trial against Caldwell, Hayes and Allison solely on Bailey's procedural due process claims stemming from his suspension.

I. FACTS

A. Background

On April 22, 1987, several inmates attempted to escape from ACDC by sawing a window with hacksaw blades. Lieutenant Brown, with the assistance of another ACDC officer, investigated the attempted escape and discovered that an inmate trustee (Tribuani) had obtained the blades from a tool box in a maintenance room to which he had been allowed access. Tribuani had concealed the blades in his pants until he was able to pass the blades to other inmates, one of which was Charles Jerkins. Subsequently, Jerkins twice informed Brown that persons who were not inmates had assisted in the escape attempt. After consultation with Allison, who was then Assistant Director of ACDC, Brown contacted the State Attorney's Office to investigate the potential wrongdoing by ACDC employees.

As a result of Brown's contact, Tileston, who was serving as a Special

Prosecutions Investigator with the State Attorney's Office, was assigned to investigate Jerkins' allegations. Tileston spoke with Brown, who told him that Jerkins had said that a "professional person" had assisted in the April escape attempt.[1] Tileston was familiar with Jerkins because Jerkins was well known as both a criminal and a "snitch" to local law enforcement authorities. Tileston testified that Jerkins was a "known credible police source" and that he had verified through city and county law enforcement officers that Jerkins had provided reliable information in the past. Tr. 38-575-12, 13; Tr. 27-561-129, 130.

On May 8, 1987, Tileston interviewed Jerkins and Jerkins named Bailey as a participant in bringing hacksaw blades

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[1] Although Brown had completed a full report regarding his own investigation into the escape attempt, he did not give Tileston this written investigative report.

into the jail. Jerkins described letters he had written to his girlfriend in which he had urged her to contact Bailey to arrange to bring hacksaw blades into the jail. Jerkins said that he and Bailey had developed a prior personal relationship. Jerkins knew Bailey's phone number and told Tileston that he had offered Bailey both $500 and $1000 for hacksaw blades. Tileston decided that he needed to test whether Bailey would accept money from Jerkins, and devised an undercover plan for this purpose. Because his office did not have the necessary equipment for his plan, Tileston obtained $500 cash and a body bug from the combined Gainesville/Alachua County Narcotics and Organized Crime Unit (NOCU). Furthermore, NOCU's Deputy Cole was assigned to provide Tileston technical assistance with the listening equipment. Tileston's plan was to give Jerkins the $500 with instructions

to offer it to Bailey. A body bug would be placed on Jerkins so that any conversations between Bailey and Jerkins could be heard and recorded. Cole's responsibility was to monitor the listening equipment.

B. Bailey's Arrest

Tileston elected to conduct his test during Bailey's May 14 work shift. Brown, who was serving as Tileston's liaison with ACDC, arranged to wire Jerkins and to give him the $500 before Bailey came on duty. One of Brown's Lieutenants (Strauss) actually placed the body bug on Jerkins and gave him the $500. Jerkins was instructed to tell Bailey he had the money and to try to get into a conversation with Bailey about hacksaw blades. Although Bailey had access to Jerkins throughout his shift because he was responsible for the jail area in which Jerkins was housed, a further opportunity for conversation

between the two men was contrived when Tileston had one of Bailey's superiors instruct Bailey to remove Jerkins from his cell (ostensibly for more fingerprinting and charges) and then put him back.

Reception from the body bug was poor; Cole reported hearing a few snippets of conversation through his listening device, but a tape recording made of this conversation was later found to be inaudible. Specifically, at 12:08 a.m. Cole reported hearing Jerkins mention the "$500." Tileston, Brown and Cole, who were stationed in Allison's office, continued their monitoring throughout the night. At 6:21 am., Cole reported that he heard mention of "hacksaw blades" transmitted through Jerkins' body bug. At this time, Tileston wanted to know if the money had passed from Jerkins to Bailey. Brown ascertained through Sullivan that the money had passed to Bailey and relayed

this information to Tileston. After a brief discussion, and wanting to capture the money before Bailey's shift ended at 7:00 am., Tileston and crew headed for the part of the jail where Bailey was stationed.

After locating Bailey, who was supervising the morning feeding of the prisoners, Tileston and Cole showed Bailey their badges and were introduced by Brown. Tileston then asked Bailey to accompany them to Allison's office to answer questions. No conversation transpired between Bailey and these officers during the five to ten minute walk to Allison's office. In Allison's office, Tileston informed Bailey that he was under arrest and Cole read Bailey his Miranda rights. After being asked about the money, Bailey removed it from his right front pants pocket, put it on the desk, and made a statement that no fingerprints would be

found on the money. The money was wrapped in white paper. Bailey also said that he had talked to two officers about what was happening, but gave no specific information about these contacts. Tr. 38-575-47, 36-568-34 to 36. Bailey then requested an attorney and questioning ceased. What Bailey's version of the arrest and the events leading up to it add to this account is insubstantial. Bailey's story reveals that Jerkins handed him a sock full of money, which he took because he knew he was supposed to confiscate contraband in the jail. According to Bailey, he dumped the money onto a piece of white paper, hoping to preserve the fingerprints of whomever had given the money to Jerkins. At first, Bailey put this bundle into a desk, and then twice tried with no avail to reach a supervisor. When Bailey noticed several inmate-trustees approaching, however, he

feared for the money's security and removed it from the desk and placed it in his pocket. He then went about his duties of overseeing inmate feeding, thinking that he would notify a supervisor once that duty was finished. He was arrested while attending to this duty.

C. Bailey's Suspension

On the morning of his arrest, Bailey was given a letter written by Allison suspending him without pay "as of 0700 hours May 14, 1987" and stating that dismissal proceedings would be taken against him if he had not "rectified the prerequisites of his job within 15 days." Bailey was then notified a second time that he was suspended without pay. By letter dated May 26, 1987, Allison advised Bailey that "effective today, you are hereby placed on suspension without pay until further notice." The parties' third communication was a November 19, 1987

letter from Bailey to Caldwell (Alachua County's Director of Corrections) asking for reinstatement, or a hearing if reinstatement was denied, or information on how to request a hearing if he was proceeding improperly. A decision by the State Attorney's Office to enter a nolle prosequi as to all criminal charges filed against Bailey had prompted this letter to Caldwell. Caldwell directed Bailey's letter to Allison,[2] who responded on December 7, 1987 by denying Bailey's request and noting that his "leave without pay" would continue pending the completion of an investigation. ACDC had requested that the Florida Department of Law Enforcement (FDLE), the body charged with certifying Florida's law enforcement officers, investigate the possibility of decertifying Bailey.

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[2] Caldwell was no longer Director of Corrections; Allison was Acting Director of Corrections.

The FDLE informed Caldwell that there was no basis for further action against Bailey via letter on June 9, 1988. Garrahan then requested that FDLE reopen its investigation, the status of which was uncertain at the time of trial. Caldwell, however, instructed Edward A. Royal, who replaced Allison when he left ACDC on February 13, 1988, to order Bailey back to work. By letter dated June 15, 1988, Royal informed Bailey that he would receive back pay and ordered him to report to work on June 20, 1988.

D. Bailey's Reinstatement

Bailey reported to work on June 20, with his lawyer and a letter from his psychiatrist in tow. Dr. Waldman, who had been treating Bailey since March 1988, Tr. 24-572-177, advised Bailey against returning to work at ACDC at that time. Thus, Bailey requested his back pay and asked that he be placed on sick leave

until his benefits were exhausted, then placed on annual leave. See Plaintiffs Exhibit 13-A (Bailey's counsel's letter); Deposition Exhibit 52 (Bailey's hand-delivered letter to this effect). The following day, Dr. Waldman initiated an involuntarily commitment to Shands Hospital on behalf of Bailey. Dr. Waldman diagnosed Bailey as suffering from a psychotic breakdown and considered him to be a threat to himself and others (particularly at ACDC). Bailey's status at Shands was subsequently converted to voluntary and he remained there for about five weeks.

Although Royal's June 15, 1988 letter promised Bailey "any and all back pay and entitlements," no monies were tendered to Bailey until September 29, 1989, almost a year after Bailey filed this lawsuit. See Defendant's Exhibit 4. The record is unclear as to whether this was an

unconditional tender of back pay or an effort at settlement. See Defendant's Exhibit 5. In any case, it is uncontroverted that the check (wherever and whatever it may be) has not been cashed. Tr. 32-480-29 to 32. The record also leaves unclear Bailey's status with ACDC at the time of trial. No hearings have been held regarding Bailey's employment status with ACDC.

II. PROCEDURAL HISTORY

Bailey's First Amended Complaint (the "Complaint") sought compensatory, punitive and injunctive relief pursuant to 42 U.S.C. s 1983 and state law. The Complaint alleged under s 1983 that the defendants deprived Bailey of liberty and property without due process of law, and conspired to do so, by arresting him without probable cause, publicizing the arrest, and subsequently suspending him. The Complaint also alleged pendent state-law

causes of action based on false arrest, malicious prosecution, civil conspiracy, and violation of state civil rights. For analytical ease we have classified Bailey's claims into five categories: (1) Bailey's s 1983 claim that various defendants violated his due process rights by depriving him of a protected property interest in his employment by suspending him without pay and without granting him a hearing (the "procedural due process claim"); (2) Bailey's s 1983 claim that various defendants violated his due process rights by depriving him of a protected liberty interest by maintaining stigmatizing information in his personnel file and not granting him a name-clearing hearing (the "name-clearing hearing claim"); (3) Bailey's s 1983 claim that various defendants conspired to deprive him of his civil rights (the "conspiracy claim"); (4) all of Bailey's claims

concerning his allegedly unlawful arrest and the publication to the news media of the arrest (the "arrest-related claims"); and (5) all of Bailey's remaining state claims and all of Lizzie Shirley Bailey's loss of consortium claims, none of which has been raised on appeal. Accordingly, we deem waived any challenge to the district court's orders on this final category of claims. All defendants filed motions to dismiss and/or motions for summary judgment in response to Bailey's Complaint.

In July 1990, the district court entered an omnibus order granting in part motions to dismiss or for summary judgment filed by various defendants. In that order, the district court granted summary judgment on the basis of qualified immunity as follows: to Brown, Allison, Caldwell, Cole and Hayes on Bailey's conspiracy and arrest-related claims; to Brown and Cole

on Bailey's procedural due process claim; and to Allison, Caldwell and Hayes on part of Bailey's procedural due process claim (his "initial" suspension).[3] The district court denied Allison, Caldwell, Hayes and Alachua County qualified immunity as to Bailey's procedural due process claim regarding his "continued" suspension; denied Tileston, City of Gainesville, Alachua County, Garrahan, Strauss and Hindery qualified immunity as to Bailey's conspiracy and arrest-related claims; and denied Caldwell, Hayes, Alachua County, City of Gainesville, Hindery, Tileston, Strauss, Garrahan, and Brown qualified immunity with respect to Bailey's name-clearing hearing claim. The district court also dismissed all of Lizzie Shirley Bailey's loss of consortium claims, none

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[3] The district court's reference to "initial" and "continuing" suspension has resulted in substantial confusion. We resolve this issue infra at part III (A) (3).

of which is at issue in this appeal.

A five-week jury trial on Bailey's remaining claims began on July 9, 1990. On that date, the district court orally granted Allison summary judgment on all remaining claims, dismissing him from this litigation. At the close of Bailey's case, all defendants moved for directed verdicts on various grounds; the district court deferred ruling on the motions until the close of all evidence. At that time, the remaining defendants renewed their directed verdict motions and Bailey moved for directed verdict as well. The district court denied Bailey's motion, but granted directed verdicts for Tileston, Alachua County, City of Gainesville, Strauss, Garrahan and Hindery as to Bailey's conspiracy and arrest-related claims. The basis of the district court's ruling was that Tileston had probable cause to arrest Bailey.

The district court also directed verdicts in favor of all defendants on all of Bailey's state claims, none of which is at issue in this appeal. Furthermore, the district court directed verdicts in favor of Tileston, City of Gainesville, Strauss, Brown, Garrahan and Hindery on Bailey's name-clearing hearing claim. These directed verdicts left three defendants (Caldwell, Hayes and Alachua County) and two claims (procedural due process and name-clearing hearing) for the jury. After the jury returned its verdict for Alachua County, and for Bailey against Caldwell and Hayes on both claims, Bailey, Caldwell and Hayes filed motions for directed verdicts, judgments notwithstanding the verdict, or a new trial. The district court denied all motions and this appeal followed.

III. DISCUSSION

A. Bailey's Appeal

1. Arrest-Related Claims

Bailey asserts that the district court erred in granting directed verdicts in favor of City of Gainesville, Alachua County, Hindery, Garrahan, Strauss and Tileston on his arrest-related claims. In granting these six defendants directed verdicts, the district court first found that Tileston had probable cause to arrest Bailey. Bailey argues, however, that Tileston did not have probable cause to arrest him of any crime[4] and that the defendants conspired to, and did, falsely arrest and prosecute him. Furthermore,

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[4] Bailey's arrest report reflects a violation of Florida Statute s 843.11, conveying tools into jail to aid escape. Tileston's post-arrest investigation, however, led him to doubt that Bailey had been involved in the April escape attempt, and Bailey was subsequently charged with bribery, unlawful compensation and unlawful possession of $500 in the jail instead. Tr. 37-574-48; Ex. 31. Bailey's efforts to attach significance to this change, however, is unpersuasive. The validity of an arrest does not turn on the offense announced by the officer at the time of the arrest. United States v. Saunders, 476 F.2d 5, 7 (5th Cir.1973); State v. Cote, 547 So.2d 993, 996 (Fla. 4th DCA 1989).

Bailey asserts that the defendants "individually and collectively possessed information that would lead a reasonable and honest person to know that he was innocent." Brief of Appellant 24. If Tileston had probable cause for the arrest, then these defendants did not violate Bailey's Fourth Amendment rights against false arrest as protected through s 1983. See Marx v. Gumbinner, 905 F.2d 1503, 1505-06 (11th Cir.1990) (existence of probable cause is an absolute bar to a s 1983 action premised on false arrest). Specifically, Bailey argues that the district court erred by taking the question of probable cause from the jury. We disagree. When considering whether a directed verdict should be upheld, our standard is the same as that applied by the district court. Carter v. City of Miami, 870 F.2d 578, 581 (11th Cir.1989). Thus, we consider all the evidence and

resolve all inferences in the light most favorable to the nonmoving party. If the facts and inferences point overwhelmingly in favor of one party, such that reasonable people, in the exercise of impartial judgment, could not arrive at a contrary verdict, then the motion was properly granted. Id. A mere scintilla of evidence does not create a jury question; there must be a substantial conflict in evidence to create a jury question. Id.

We (and the district court) must evaluate these facts and inferences according to the legal standard for probable cause.[5] Simply stated, that

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[5] We note that Bailey's briefs to this Court mistakenly conflated the standards that a court uses in ruling on a directed verdict motion and the standard that an arresting officer must use in determining whether probable cause for an arrest is present. An officer is not required, as Bailey argues, to resolve all inferences and all factual conflicts in favor of the suspect. An officer's decision to arrest a suspect may be objectively reasonable even though that officer has not specifically discarded every possible non-criminal explanation for the conduct that forms the basis

standard requires that an arrest be objectively reasonable under the totality of the circumstances. See Illinois v. Gates, 462 U.S. 213, 229, 103 S.Ct. 2317, 2327, 76 L.Ed.2d 527 (1983). A familiar formulation holds that a "law enforcement officer has probable cause to arrest a suspect if the facts and circumstances within the officer's knowledge, of which he or she has reasonably trustworthy information, would cause a prudent person to believe, under the circumstances shown, that the suspect has committed, is committing, or is about to commit an offense." Von Stein v. Brescher, 904 F.2d 572, 578 (11th Cir. 1990). Probable cause requires more than mere suspicion, but does not require convincing proof. Indeed, "[t]he Constitution does not

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for her decision to arrest a suspect. See United States v. Pantoja-Soto, 739 F.2d 1520 (11th Cir.1984), cert. denied, 470 U.S. 1008, 105 S.Ct. 1369, 84 L.Ed.2d 389 (1985)

guarantee that only the guilty will be arrested. If it did, s 1983 would provide a cause of action for every defendant acquitted." Baker v. McCollan, 443 U.S. 137, 145, 99 S.Ct. 2689, 2695, 61 L.Ed.2d 433 (1979)

The district court properly found that Tileston had probable cause to arrest Bailey by examining what the evidence revealed that Tileston knew at the time of the arrest. Tileston knew that an escape attempt had occurred at ACDC in April and that one of the inmates involved in that escape attempt had implicated Bailey. Tileston had investigated this tip by interviewing Jerkins personally and by checking Jerkins' reliability with city and county law enforcement officers even though Tileston was already familiar with Jerkins. Bailey did not controvert this at trial. Tileston also knew that Cole had heard a comment regarding the $500

transmitted through Jerkins' body bug around midnight. At trial, Bailey admitted that around midnight Jerkins had said "I want out. I want to get out. I've got $500 for you now and $1,000 for you Sunday night," and that Bailey had responded by telling him to "stay cool." Tr. 24-572-140. Bailey also admitted that he never notified anyone of Jerkins' midnight bribe attempt during his shift. Tr. 25-573-61 to 65. Although Bailey testified that he had twice attempted to notify his sergeant after taking the money from Jerkins, he admitted that he did not succeed in communicating with anyone. The district court accepted Bailey's testimony regarding his notification attempts as true, but correctly noted that it was also true that Bailey did not communicate this fact to anyone "at, near, or after his arrest." Tr. 39-576-109. Furthermore, Tileston knew that the money had passed to

Bailey through Brown's verification. Id. at 112-13. And finally, Tileston knew that Bailey said nothing about having the money in his pocket when confronted in his work area, when walking to Allison's office, and when informed he was under arrest in Allison's office. Only when asked did Bailey turn over the $500.

Moreover, in directing a verdict for these defendants based on probable cause, the district court properly accepted as true Bailey's version of the events. See Tr. 39-576-107 to 114. The flaw in Bailey's efforts to undermine Tileston's probable cause is that Bailey's version of the facts failed to create a substantial conflict in what Tileston knew at the time of the arrest.[6] For instance, Bailey makes

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[6] Bailey argues that Cole, not Tileston, arrested him. Bailey has not shown a substantial conflict in the evidence regarding who arrested him. Testimony from Bailey, Tileston, Brown and Cole supports that it was Tileston who arrested Bailey. Bailey takes Cole's statement that an arrest may have "technically" occurred when he and Tileston first confronted Bailey rather than later

much of his prior communications with Strauss, Garrahan and Phillips regarding inmate contacts. Bailey testified that he had previously talked with Strauss regarding inmate contacts and that he had written Garrahan a letter in February 1987 regarding inmate contacts, which Garrahan referred to Strauss. Bailey also testified that he told Strauss that he had been approached again by an inmate[7] as Strauss was leaving ACDC and Bailey was arriving the evening prior to Bailey's

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in Tileston's office out of context to make this argument. We need not decide this issue, because we find that Tileston had probable cause to arrest Bailey at either point. Tileston testified that he made the decision to arrest Bailey in Allison's office after learning that the money had passed from Jerkins to Bailey. Thus, from the time Tileston left that office to confront Bailey and bring him back to Allison's office, no facts changed that would disturb the district court's probable cause decision.

[7] Unknown to Tileston (or anyone else), Jerkins had taken it upon himself to phone Bailey at home during the afternoon prior to Bailey's arrest in an unplanned effort to further entice Bailey into conversation with him.

arrest. Furthermore, Bailey testified that he told Phillips, the corrections officer on duty with Bailey the night of his arrest, generally about prior inmate contacts and his communications with Strauss and Garrahan. Although the lack of communication among ACDC personnel is unfortunate,[8] none of Bailey's prior discussions was reported to Tileston. The record is clear that Tileston did not know of these prior communications until months after the arrest. It was also

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[8] Moreover, ACDC's poor communication was enhanced by the nature of an undercover internal investigation, where the methodology involved isolation and deference to a "need to know" communication standard. In addition, Bailey's prior communications were all vague or general references to inmate contacts--none mentioned Jerkins (or anyone else) by name. This level of generality made it less likely that these communications would have retained significance in the minds of Garrahan and Strauss in the face of their (and others') testimony that inmate contacts are a common problem that jail personnel must handle. In any case, Bailey's arguments that communication between the ACDC officers should have been better are misdirected. Negligent acts do not give rise to s 1983 liability. Daniels v. Williams, 474 U.S. 327, 336, 106 S.Ct. 662, 667, 88 L.Ed.2d 662 (1986).

uncontroverted that Strauss told no one of Bailey's comment during shift change the evening prior to Bailey's arrest. Bailey also points to the fact that Brown had not given Tileston his written investigative report concerning the April escape attempt, and argues that had he done so Tileston would have known that he was innocent. Bailey, however, overstates the significance of this omission. Brown's written report, apparently unlike his oral report to Tileston, would have told Tileston that Tribuani had confessed to his role in the April escape attempt. The report would not have definitively established the source of the hacksaw blades used in that escape attempt, nor would it have ruled out the possibility that another escape attempt (involving Bailey) was being formulated. Thus, none of these factors that Bailey points to undermine what Tileston did know at the

time of the arrest;[9] none of these factors undermine the district court's determination that Tileston had probable cause to make that arrest.[10] Accordingly,

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[9] At trial, each officer asked testified that Bailey should have immediately notified his superior when Jerkins attempted to bribe him and especially when he actually accepted the $500. They also testified that Bailey could have interrupted his feeding duty with no breach of security to notify someone that he had just confiscated $500. See, e.g., Tr. 28-562-255 to 257. Once again, Bailey's arguments that he might have taken the $500 because it was contraband, not because he was taking a bribe (like his explanation of why he had the money in his pocket), affect his ultimate guilt or innocence, not the reasonableness of Tileston's decision to arrest him. To restate, Bailey did not have to be guilty to be arrested.

[10] Although the district court indicated that the defendants were entitled to the protection of qualified immunity once probable cause was found, see Tr. 39-576-113-14, we note that granting qualified immunity on this basis was ar unnecessary step. If probable cause is present, there is no need for the defendants to rely on the qualified immunity defense. "The existence of probable cause ... is an absolute bar to a section 1983 action for false arrest." Marx v. Gumbinner, 905 F.2d 1503, 1505-06 (11th Cir. 1990). Because we uphold the district court's finding of probable cause, we do not address the question of whether the defendants may have been entitled to qualified immunity in the absence of probable cause. Although several defendants argue that only "arguable probable cause" is necessary for qualified immunity, we do not reach that issue. Compare Von Stein v. Brescher, 904 F.2d 572, 579 (11th Cir.1990) ("In determining whether qualified immunity exists, the

we agree that Tileston had probable cause to arrest Bailey and we affirm the district court's final judgments for all defendants with respect to all of Bailey's arrest-related claims.

2. Conspiracy Claims

As noted above, Bailey's theory of this case was not only that the defendants had falsely arrested him, but also that they had conspired to deprive him of his civil rights by arresting, jailing and suspending him without due process of law. The district court, however, found that there was a "total lack of evidence" to support Bailey's theory that Alachua County, Hindery, City of Gainesville, Strauss, Tileston and Garrahan conspired

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issue is 'not probable cause in fact but "arguable" probable cause,' " quoting Gorra v. Hanson, 880 F.2d 95, 97 (8th Cir.1989), in turn quoting Floyd v. Farrell, 765 F.2d 1, 5 (1st Cir.1985)) with Llaguno v. Mingey, 763 F.2d 1560, 1569 (7th Cir.1985) (en banc) (Judge Posner noting that giving defendants an opportunity for qualified immunity in the absence of probable cause gives them "two bites at the apple").

to deprive him of his property and liberty by falsely arresting him, jailing him, and suspending him from his job. Tr. 39-576-114. Our de novo review of the record supports the district court's conclusion. No reasonable juror could have found a conspiracy because Bailey presented no evidence of one. To prove a 42 U.S.C. s 1983 conspiracy, a plaintiff "must show that the parties 'reached an understanding' to deny the plaintiff his or her rights [and] prove an actionable wrong to support the conspiracy." Bendiburg v. Dempsey, 909 F.2d 463, 468 (11th Cir.1990), cert. denied, --- U.S. ----, 111 S.Ct. 2053, 114 L.Ed.2d 459 (1991). This, Bailey did not do. Indeed, the record in this case reveals just the opposite of conspiracy. Whereas the linchpin for conspiracy is agreement, which presupposes communication, the defendants in this case suffered from an

extreme lack of communication. Thus, we agree with the district court that Bailey failed to establish his conspiracy theory of liability and affirm the district court's final judgments for all defendants on this claim.

3. Procedural Due Process Claims

a. Against Caldwell, Hayes and Allison

As a public employee, Bailey possessed a property right in his continued employment with ACDC. See, e.g., Board of Regents v. Roth, 408 U.S. 564, 576-78, 92 S.Ct. 2701, 2708-10, 33 L.Ed.2d 548 (1972). Indeed, this question does not seem to have been disputed below. What is disputed is whether Bailey was deprived of that property right without due process of law-that is, what process was Bailey due and what did he receive? In answering that question, we note that neither the personnel policies of Alachua County nor

the state law of Florida provides the answer. Rather, federal constitutional standards determine what process Bailey was due. Cleveland Board of Educ. v. Loudermill, 470 U.S. 532, 541, 105 S.Ct. 1487, 1492, 84 L.Ed.2d 494 (1985); Logan v. Zimmerman Brush Co., 455 U.S. 422, 432, 102 S.Ct. 1148, 1155, 71 L.Ed.2d 265 (1982). Bailey challenges several issues related to his suspension without pay from ACDC. First, the district court initially granted Allison, Caldwell, Hayes and Alachua County summary judgment as to Bailey's "initial suspension" without pay in its July order. Confusion has reigned since. Bailey argues that by "initial suspension," the district court meant Allison's May 14th letter. Thus, according to Bailey, the court left open a window of potential liability beginning on May 26th when Allison wrote Bailey a second letter suspending him without pay.

Bailey, however, argues that the district court erred in not leaving this window open as of May 14. Caldwell, Hayes and Alachua County argue that the district court's "initial suspension" freed them from liability up to the point at which Bailey's criminal charges were dropped and he requested reinstatement and a hearing (November 19, 1987).[11] Although the parties participated in a lengthy argument on this point in chambers, the district court did not resolve the dispute at that time or thereafter. See Tr. 20-569-3 to 11. Caldwell and Hayes also assert that perhaps their window of liability opened as late as February 13, 1988. On that date Allison left ACDC: since the district court had granted summary judgment to Allison on the procedural due process

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[11] Caldwell and Hayes, in their cross appeal, argue that they were entitled to qualified immunity as to Bailey's entire procedural due process claim. We address this argument in part III(B)(1)(b) below.

claims because "he was already gone," Caldwell and Hayes reason that they, too, must be free from liability for this period because it was Allison who actually wrote all three letters to Bailey.

Fortunately, we need not affix dates to Bailey's procedural due process claims to resolve this confused issue. Rather, as developed below, we separate Bailey's procedural due process claim into two strands: (1) his claim that he was deprived of due process when he was suspended without pay at the time of his arrest on May 14, 1987 without notice or an opportunity for a hearing (the "predeprivation procedural due process claim"), and (2) his claim that he was deprived of due process when ACDC continued his suspension without pay after May 14, 1987 without notice and an opportunity for a hearing (the "postdeprivation procedural due process

claim"). The district court stated in its July order that "they [Allison, Caldwell and Hayes] reasonably believed that Bailey's suspension without pay without a predeprivation hearing was lawful, considering the seriousness of the charges against him." R. 388. The district court then granted qualified immunity to Allison, Caldwell, and Hayes for Bailey's initial suspension. We think that the proper interpretation of the district court's ruling is that Bailey had not carried his burden of demonstrating that the law was clearly established that he had a constitutional right to a predeprivation hearing before being suspended. To defeat a qualified immunity defense, Bailey was required to show that the defendants violated a clearly established statutory or constitutional right of which a reasonable person would have known. Mitchell v. Forsyth, 472 U.S.

511, 528, 105 S.Ct. 2806, 2816, 86 L.Ed.2d 411 (1985); see also Rich v. Dollar, 841 F.2d 1558, 1563-64 (11th Cir.1988) (explaining shifting burdens of proof once defendant raises affirmative defense of qualified immunity). In deciding whether a constitutional right is clearly established, we must judge the contours of the law at the time the employment decision was being made, irrespective of subsequent developments in the law. Thus, public officials are charged with keeping abreast of the current state of the law, not with anticipating changes. Whether the law is "clearly established" is a question of law that we review de novo. Courson v. McMillian, 939 F.2d 1479, 1487 (11th Cir.1991). We agree with the district court that Bailey did not carry his burden of establishing that he had a clearly established constitutional right to a predeprivation hearing.

In Parratt v. Taylor, 451 U.S. 527, 539-40, 101 S.Ct. 1908, 1914-15, 68 L.Ed.2d 420 (1981), overruled in part on other grounds, Daniels v. Williams, 474 U.S. 327, 106 S.Ct. 662, 88 L.Ed.2d 662 (1986), the Supreme Court stated that the requirement of a hearing does not always require the state to provide a hearing prior to the initial deprivation. "[T]he necessity of quick action by the State or the impracticality of providing any meaningful predeprivation process, when coupled with the availability of some meaningful means by which to assess the propriety of the State's action at some time after the initial taking, can satisfy the requirements of procedural due process." Id. 451 U.S. at 539, 101 S.Ct. at 1915. After noting that the "fundamental requirement of due process is the opportunity to be heard and it is an 'opportunity which must be granted at a

meaningful time and in a meaningful manner,' " the Court confirmed that it had "rejected the proposition that 'at a meaningful time and in a meaningful manner' always requires the State to provide a hearing prior to the initial deprivation of property." Id. at 540, 101 S.Ct. at 1915 (quoting Armstrong v. Manzo, 380 U.S. 545, 552, 85 S.Ct. 1187, 1191, 14 L.Ed.2d 62 (1965)); see also Cleveland Board of Educ. v. Loudermill, 470 U.S. 532, 105 S.Ct. 1487, 84 L.Ed.2d 494 (1985) (delay of nine months in providing postdeprivation hearing not constitutionally infirm).[12]

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[12] The flexibility in the constitutional requirements pertaining to a predeprivation hearing derives from the balancing approach first enunciated in Mathews v. Eldridge, 424 U.S. 319, 335, 96 S.Ct. 893, 903, 47 L.Ed.2d 18 (1976). The need for some form of predeprivation hearing is determined from balancing the competing interests at stake. "These are the private interests in retaining employment, the governmental interest in the expeditious removal of unsatisfactory employees and the avoidance of administrative burdens, and the risk of an erroneous termination." Loudermill, 470 U.S. at 542-43, 105 S.Ct. at 1493-94 (citing Mathews, 424 U.S. at 335, 96 S.Ct. at 903). Thus,

In applying this flexible legal standard regarding predeprivation due process to the facts of this case, we conclude that Bailey did not establish that Caldwell, Hayes and Allison reasonably would have known their action in initially suspending him without pay upon his arrest was unlawful. A corrections facility's paramount concern is security; a guard suspected of corruption compromises that security. Therefore, the defendants could have reasonably believed that this was a situation with a "necessity for quick action" that made a predeprivation hearing impracticable. Furthermore, the defendants were all aware that Alachua County's personnel regulations provided an

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while we agree with Bailey that in the usual case notice and an opportunity to be heard before being deprived of a property interest reflects standard due process requirements, Bailey did not succeed in demonstrating that the particular circumstances of his case made it unreasonable for Caldwell, Hayes and Allison to believe that it was lawful to forego a hearing prior to May 14 when Bailey was arrested and suspended.

appeal procedure for employees to contest disciplinary action taken against them. It would have been reasonable for the defendants to believe that these procedures were capable of providing Bailey an adequate postdeprivation remedy. Thus, we agree with the district court's ruling that Caldwell, Hayes and Allison are entitled to qualified immunity with respect to Bailey's procedural due process claims regarding his right to a predeprivation hearing.[13]

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[13] Although Bailey argues that he could have been suspended with pay from the beginning, we do not think that he carried his burden of establishing that the contours of that right were clearly established at the time in question. His only source of this option is one sentence of dicta in Loudermill: "[I]n those situations were the employer perceives a significant hazard in keeping the employee on the job, it can avoid the problem by suspending with pay." Loudermill, 470 U.S. at 544-45, 105 S.Ct. at 1494-95. While we agree that the problem of a post-deprivation remedy may be avoided by suspending with pay, for then there is not a deprivation, we do not think that by pointing to one sentence Bailey carried his burden of showing that suspension with pay in the circumstances of this case was required by clearly established law.

The district court correctly allowed Bailey's postdeprivation procedural due process claim to remain viable, however, and it ultimately went to the jury against Caldwell, Hayes and Alachua County. It should also have gone to the jury against Allison. Section 1983 requires proof of an affirmative causal connection between the official act or omission complained of and the alleged constitutional deprivation. See Williams v. Bennett, 689 F.2d 1370, 1380-81 (11th Cir.1982), cert. denied, 464 U.S. 932, 104 S.Ct. 335, 78 L.Ed.2d 305 (1983). Allison did not leave his employment with ACDC until February 13, 1988; all three letters from Allison to Bailey regarding his suspension[14] were

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[14] We note that although various defendants have argued at various points that the wording "leave without pay" (December 7 letter) as opposed to "suspension without pay" (May letters) is significant, we disagree. In the face of uncontroverted evidence that no hearing or other administrative proceeding was held to determine Bailey's status, this semantic difference is insignificant for our purposes. Indeed, Bailey's status with ACDC was still uncertain at the time of

sent before that time (May 14, May 26 and December 7, 1987). At trial, Allison testified that he consulted with Caldwell and Hayes and received their approval for the action he took against Bailey on May 14. Tr. 28-562-1172 to 174. Although Hayes, who was Alachua County's Personnel Director, denied the degree of consultation that Allison attributed to her, see Tr. 29-563-91, 92, as did Caldwell, see Tr. 29-563-116, 117, Bailey established sufficient evidence to warrant jury consideration of Caldwell and Hayes' personal involvement. For instance, Hayes testified that "[i]t would be my responsibility to ensure that these [lengthy suspensions without pay] situations don't happen." Tr. 29-563-69.[15]

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trial. See, e.g., Tr. 29-563-122 (testimony of Caldwell).

[15] Hayes also testified that as of May 1987 she was aware of court precedent on "giving the employee a hearing to air his side of or his position when he was subjected to disciplinary proceedings or suspension proceedings." Tr. 29-563-

And Caldwell testified that he was the person "in charge of the administrative action taken against the Department of Corrections personnel." Tr. 29-563-122, 123. We conclude that Bailey presented sufficient evidence so that a reasonable jury could find the requisite causal connection between the acts or omissions of each of the three defendants and his alleged deprivation with respect to his employment with ACDC. The jury is the appropriate body to resolve any factual conflicts in the evidence and to make credibility determinations where applicable. There is nothing in the record to support a principled legal distinction between Allison, Caldwell and Hayes in regard to Bailey's postdeprivation procedural due process claims. Allison should have gone to the jury along with Caldwell and Hayes on

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68, 69.

Bailey's postdeprivation procedural due process claims; he was not entitled to summary judgment because he was "already gone" as the district court held.

b. Alachua County

Bailey also argues that Alachua County should be held liable on his procedural due process and name-clearing hearing claims and that the district court erred by refusing to grant either his motion for directed verdict or his motion for judgment notwithstanding the verdict as to Alachua County. Our standard of review on this issue is the same as discussed above in reference to a directed verdict motion. See supra part III (A) (1). We find firm support for the jury's verdict for Alachua County in the record. A local government cannot be held liable for its employees' acts under s 1983 on a theory of respondeat superior; the liability must be founded on an official policy or custom.

Monell v. Department of Social Services of the City of New York, 436 U.S. 658, 691, 98 S.Ct. 2018, 2036, 56 L.Ed.2d 611 (1978). An isolated decision by a municipal employee constitutes official policy only if that employee has "final policymaking authority" for the challenged act under state law. City of St. Louis v. Praprotnik, 485 U.S. 112, 123, 108 S.Ct. 915, 924, 99 L.Ed.2d 107 (1988). In this case, the record is devoid of evidence that either Caldwell, Hayes or Allison had "final policymaking authority" for Alachua County's personnel policy. Testimony at trial was unequivocal that final policymaking authority rested in the Board of County Commissioners. Furthermore, the record is also devoid of evidence that Alachua County had any official policy or custom to deny Bailey any name-clearing hearing to which he may have been entitled. On the record before us, no

reasonable jury could have found liability on the part of Alachua County for Bailey's procedural due process or name-clearing hearing claims. Thus, we affirm the district court's final judgment dismissing all of Bailey's claims against Alachua County.

In summary, as to Bailey's appeal we affirm all of the district court's judgments except for the dismissal of Allison from this litigation through summary judgment. Furthermore, we have clarified that the viable procedural due process claims remaining against Caldwell, Hayes and Allison are postdeprivation claims; the district court properly granted these three defendants qualified immunity as to Bailey's predeprivation procedural due process claims.

B. Caldwell & Hayes' Appeal

Caldwell and Hayes mount a two-pronged attack. First, they argue that they were

entitled to qualified immunity on Bailey's procedural due process and name-clearing hearing claims and accordingly assert that the district court erred in not granting either their motions for summary judgment, their motions for directed verdict or their motions for JNOV. Second, they argue that several errors in the conduct of the trial warrant reversal of the jury's verdict. We discuss these two prongs of their argument below.

1. Qualified Immunity

a. Name Clearing Hearing.

Caldwell and Hayes argue that the district court erred in denying them qualified immunity with respect to Bailey's claim that they deprived him of a constitutionally protected liberty interest by not providing him a name-clearing hearing for alleged stigmatizing information contained in his personnel file. In its omnibus July order, the

district court denied Caldwell and Hayes qualified immunity on this issue, subjecting them to liability on this claim from May 1, 1989 forward. Tr. 14-388-12. The court highlighted May 1, 1989 because of this Circuit's decision on that date in Buxton v. City of Plant City, Fla., 871 F.2d 1037 (11th Cir.1989). The district court reasoned that the law became "clearly established" on that date; thus, Caldwell and Hayes were not entitled to summary judgment on the basis of qualified immunity. Whether the law is clearly established is a question of law we review de novo. Moore v. Morgan, 922 F.2d 1553, 1556 (11th Cir. 1991). We agree with Caldwell and Hayes that the district court erred in denying them qualified immunity on this claim; they were entitled to qualified immunity as a matter of law on this issue.

In deciding whether the law is clearly

established, we ask whether the legal contours of the right at issue are clear and specific enough for a reasonable official to have known that her actions were unlawful. Anderson v. Creighton, 483 U.S. 635, 640, 107 S.Ct. 3034, 3039, 97 L.Ed.2d 523 (1987); Courson v. McMillian, 939 F.2d 1479, 1488 (11th Cir. 1991). Buxton explicitly stated that it faced an issue of first impression in this Circuit in deciding whether placing stigmatizing information in the personnel file of a public employee constitutes publication sufficient to trigger the employee's right to procedural due process. Buxton, 871 F.2d at 1042. Thus, prior to Buxton, it was not clearly established that Bailey was entitled to a name-clearing hearing regarding alleged stigmatizing information in his personnel file. To hold Caldwell and Hayes accountable to Bailey for decisions rendered during the pendency of

Bailey's litigation is to hold them to too stringent a standard. Caldwell and Hayes filed motions to dismiss this claim on the basis of qualified immunity on March 21, 1989, well before Buxton was decided. See R. 141. Caldwell and Hayes are entitled to qualified immunity with respect to Bailey's name-clearing hearing claims; that issue should not have gone to the jury.[16]

b. Procedural Due Process Claim

Caldwell and Hayes also argue that they were entitled to qualified immunity with respect to Bailey's procedural due process claims. As noted above, the district court granted Caldwell and Hayes qualified immunity with respect to Bailey's "initial" suspension. We have concluded that this is best seen as granting

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[16] Because we hold that Caldwell and Hayes qualifiedly immune as to Bailey's name-clearing hearing claim, we do not address the balance of their arguments on this claim such as whether any information in Bailey's file was "false."

Caldwell and Hayes qualified immunity for Bailey's predeprivation claim, and we uphold that decision. Caldwell and Hayes also argue that they are entitled to qualified immunity with respect to Bailey's postdeprivation claim. As noted earlier, here they ask too much. Although the district court did not explicitly rule on Caldwell and Hayes' qualified immunity defense, we interpret the district court's actions as rejecting that defense.[17]

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[17] Caldwell and Hayes first assert that the district court erred in not explicitly ruling on whether they were entitled to qualified immunity, and then, by refusing to submit the issue of qualified immunity to the jury. This argument is contrary to the law in this circuit. See Ansley v. Heinrich, 925 F.2d 1339, 1348 (11th Cir.1991) (qualified immunity is an affirmative defense from trial and not a defense to liability issues raised during trial, thus once it is denied pretrial, the jury should determine the factual issues without any mention of qualified immunity); see also Mitchell v. Forsyth, 472 U.S. 511, 526, 105 S.Ct. 2806, 2815, 86 L.Ed.2d 411 (1985) (qualified immunity is in essence an immunity from suit). We recognize, as did the panel in Ansley, that there is a split of authority in the circuits as to whether qualified immunity from damages may be asserted at trial and is properly included in jury instructions. See Ansley, 925 F.2d at 1345-48.

Furthermore, we agree that Caldwell and Hayes are not entitled to qualified immunity for Bailey's postdeprivation procedural due process claims.

Unlike his efforts regarding his predeprivation due process claim, Bailey has shown that the law was clearly established that he was due some "meaningful" process within a "meaningful" time. See supra part 111(A) (3). Moreover, Bailey has shown a substantial conflict in the evidence that prohibits us from deciding whether Bailey received less process than he was due as a matter of law. At trial Caldwell, Hayes and Allison testified that they did not give Bailey notice of his appeal rights. The personnel procedures applicable to ACDC employees require that an employee receive notice of his appeal rights when disciplinary action is taken against him. Caldwell and Hayes attempted to deflect

their technical noncompliance by arguing that Bailey had used the appeal procedure before and was already aware of it, thus obviating the need for them to provide him notice or at least making their failure to provide him notice harmless. The only evidence introduced by Caldwell and Hayes on this point, however, was letters from Bailey regarding some overtime pay he believed he had been shorted. See Plaintiffs Exhibit 201. Neither Bailey's handwritten letter regarding this overtime pay nor a typewritten letter that a secretary at ACDC had done for Bailey mention the appeal process to which Caldwell and Hayes referred. See id. Therefore, a jury could have reasonably resolved this fact-bound notice issue in Bailey's favor.

Furthermore, Caldwell and Hayes both asserted at trial that Bailey was not entitled to a hearing from ACDC until his

criminal charges were dropped and that they would not have provided him with one had he made a request. Caldwell and Hayes' argument is that a hearing would have been futile while criminal charges were pending against Bailey, thus excusing them (at least up to that point) from not providing him with a hearing regarding his employment with ACDC.[18] Their argument tries to prove too much: "The right to a hearing does not depend on a demonstration of certain success." Cleveland Board of Educ. v. Loudermill, 470 U.S. 532, 544, 105 S.Ct. 1487, 1494, 84 L.Ed.2d 494 (1985) (citing Carey v. Piphus, 435 U.S. 247, 266, 98 S.Ct. 1042, 1053, 55 L.Ed.2d 252 (1978)). Perhaps Bailey could have convinced ACDC to suspend him with pay or to place him in a non-security position

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[18] Moreover, although closely factually related, the criminal process against Bailey would not have automatically resolved his employment rights with Alachua County.

during the pendency of the criminal action against him; perhaps Bailey would not have even appeared at his hearing. Simply put, the answers to these questions are irrelevant. Moreover, it is inconsistent for Caldwell and Hayes to argue both that the personnel regulations provided Bailey all the process he was due and in the same breath admit that they would not have given Bailey a hearing (or that he was not entitled to one) until his criminal charges were dropped. A jury is entitled to resolve this inconsistency as it sees fit. Moreover, Bailey did request a hearing--the day after he learned that his criminal charges had been dropped, which makes his request extremely timely if measured from the point at which Caldwell and Hayes testify the measurement should start. These are examples of factual disputes concerning Bailey's procedural due process claim that prohibit us from

rendering a decision on this claim as a matter of law. These issues may be addressed more succinctly upon remand for a new trial against Caldwell, Hayes and Allison on Bailey's postdeprivation procedural due process claims. We have already concluded that Allison should have been a defendant in Bailey's postdeprivation due process claim and that Bailey's name-clearing hearing should not have gone to the jury. As discussed below, we also find that significant prejudicial errors were committed during the trial, requiring reversal of the jury's verdict for Bailey against Caldwell and Hayes.

2. Trial Errors

a. Motion to Sever

The first ruling that Caldwell and Hayes attack is the district court's refusal to sever the employment-related due process issues from the earlier false arrest,

false imprisonment and conspiracy issues. They argue that a district court may order separate trials of any claims or issues "in furtherance of convenience or to avoid prejudice, or when separate trial will be conducive to expedition and economy." Fed.R.Civ.P. 42(b). Furthermore, Rule 21 provides that "any claim against a party may be severed and proceeded with separately." Fed.R.Civ.P. 21. We will not disturb a district court's decision not to order separate trials absent an abuse of discretion. T.D.S. Inc. v. Shelby Mut. Ins. Co., 760 F.2d 1520, 1535 (11th Cir.1985), modified on other grounds, 769 F.2d 1485 (11th Cir.1985). Although our review of the record in this case does not enable us to conclude that the district court's severance denial alone was an abuse of discretion warranting reversal of the jury's verdict, we do find that this issue raises substantial doubt and

question that further reinforces our decision to reverse the jury verdict on the basis of the other errors we discern. We now turn to those errors.

b. Juror Johns

Caldwell and Hayes argue that the district court abused its discretion by refusing to exclude a juror (Johns) from the panel. The district court denied their counsel's request that Johns be stricken from the jury panel for cause (no preemptory challenges remained). Tr. 20-569-117 to 119. Our question on appeal is whether there is fair support in the record for the district court's conclusion that the juror would be impartial. Patton v. Yount, 467 U.S. 1025, 1038, 104 S.Ct. 2885, 2892, 81 L.Ed.2d 847 (1984) . We conclude that the required support is missing in this case. At the time of trial, Johns had been employed at Shands Hospital for ten years in the psychiatric

unit and was working as an administrative assistant to the Senior Director of Nursing. Tr. 20-569-50, 51, 67, 68. Before the trial, Johns knew both Bailey and Dr. Waldman, Bailey's treating psychiatrist and a witness in the case. Shands hospital is not only the institution at which Bailey was treated and in which Bailey was hospitalized for over a month, it was also his employer at the time of trial. Tr. 20-569-50 to 52. Thus, Johns was a coworker of Bailey's and of Dr. Waldman's. Johns testified that she knew many of the potential witnesses through her employment. Tr. 20-569-106, 107.

Johns' relationship to Bailey and to Dr. Waldman raised substantial doubts about her ability to serve as a juror fairly and impartially. What is more, the colloquy between Johns and the court did not dispel these doubts. "Doubts about the esistence

of actual bias should be resolved against permitting the juror to serve, unless the prospective panelist's protestation of a purge of preconception is positive, not pallid." United States v. Nell, 526 F.2d 1223, 1230 (5th Cir.1976).[19] The record in this case leaves juror Johns' impartiality in question. The record reveals that the district court interrupted Johns before letting her finish her response to questions about her knowledge of Bailey and his mental condition, leaving that issue inadequately explored.[20] Furthermore,

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[19] In Bonner v. City of Pritchard, 661 F.2d 1206, 1209 (11th Cir.1981) (en banc), this Court adopted as binding precedent all decisions of the former Fifth Circuit rendered prior to October 1, 1981.

[20] One relevant portion of Johns discussion with the district court is as follows:

> THE COURT: [Anything about your knowledge of] Mr. Bailey that would, in any way, tend to influence your verdict in this case? MS. JOHNS: I don't feel so at all but-THE COURT: Could you tell us how you know him through acquaintanceship at the hospital? MS. JOHNS: That's awkward for me because at least my awareness of him has to do with a confidentiality issue at the hospital.

Johns responses to whether her connections to Bailey would make any difference to her ability to serve as an impartial juror were hesitant and equivocal.[21] Because Bailey's mental condition was a key issue at trial, and because the record discloses

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> THE COURT: Does it have to do with any of his physical or mental condition? MS. JOHNS: Yes, sir.... THE COURT: [Y]ou have become aware of certain facts about Mr. Bailey or certain conditions, either emotional or mental that he may have or what? MS. JOHNS: Only in the very broadest of sense. I do work with inpatient units, so I don't know anything in particular about him. I just know that he has been-Tr. 20-569-51, 52.

[21] Johns' uncertainty is revealed in the following excerpt of her sidebar conference with the district court: THE COURT: [Bailey] was a patient? MS. JOHNS: He also is an employee at Shands. I've seen him as an employee.

> THE COURT: Would any of [this] make any difference to you sitting on the jury?
> MS. JOHNS: I don't believe so but I'm not quite sure.
> I'm not the one to make that decision.
> THE COURT: We wanted to know what you know about him.
> MS. JOHNS: I have no personal connection at all.
> THE COURT: Cause is denied....
>
> Tr. 20-569-119.

that Johns herself was uncertain about her ability to be impartial, we agree with Caldwell and Hayes that the district court abused its discretion in refusing to exclude Johns for cause. See Depree v. Thomas, 946 F.2d 784, 790 n. 11 (11th Cir.1991) (distinguishing between potential bias that further investigation eliminates and potential bias that is either not adequately explored or not adequately eliminated by further investigation). In sum, we do not find fair support in the record for the district court's conclusion that juror Johns would be impartial.

c. Jury Instructions on Damages

Caldwell and Hayes contend that the district court abused its discretion in refusing to submit Caldwell and Hayes' requested instruction on damages to the jury. They argue that the district court's jury instruction on damages was

prejudicial and misleading because it failed to separate the damages attributable to claims involving false arrest and imprisonment from the damages attributable solely to Bailey's procedural due process claims. We agree. Caldwell and Hayes asked the Court to instruct the jury that it could not award damages against them that were caused by the arrest, imprisonment or prosecution of Bailey. Instead, the court instructed the jury, inter alia, that "you should assess the amount you find to be justified by the preponderance of the evidence as full, just and reasonable compensation for all of the plaintiffs' [sic] damages." Tr. 42-578-17.

Judge Fay has recently explained this Court's approach in
addressing a challenge to a denied jury instruction:

On appeal, we examine whether the jury

charges, considered as a whole, sufficiently instructed the jury so that the jurors understood the issues and were not misled. The trial judge's refusal to give a requested instruction is not error where the substance of that proposed instruction was covered by another instruction that was given. If a requested instruction is refused and is not adequately covered by another instruction, the court will first inquire as to whether the requested instruction is a correct statement of the law. In such a scenario, if the requested instruction does accurately reflect the law, the next step is to assess whether the instruction addresses an issue that is properly before the jury. Even if both of these criteria are met there must still be a showing of prejudicial harm that resulted from the failure of the trial court to give the requested instruction before the judgment

will be disturbed on that ground.

Wilkinson v. Carnival Cruise Lines, Inc., 920 F.2d 1560, 1569 (11th Cir.1991) (citations omitted).

Applying this step-by-step analysis to the facts of this case, we conclude that the district court's refusal of Caldwell and Hayes' requested jury instruction was prejudicial error. First, the substance of Caldwell and Hayes' requested instruction was not covered by another instruction nor by the balance of the instructions as a whole. For five weeks the jury heard testimony regarding not only Bailey's alleged damages from a procedural due process violation, but also regarding his alleged damages from his arrest-related claims. This was because those claims were viable until the district court directed verdicts on them at the close of all testimony. On the eve of jury deliberations, the class of

defendants suddenly decreased from ten to three. After that, any damage flowing from Bailey's lawful arrest was not compensable. Realizing that the jury had heard testimony regarding all of Bailey's damages, Caldwell and Hayes requested instruction endeavored to focus the jury on damages attributable to them.[22] Moreover, their requested instruction accurately reflected the law. Only those damages actually resulting from a procedural due process deficiency may be compensated. Carey v. Piphus, 435 U.S.

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[22] Although Caldwell and Hayes argue that Bailey did not prove that he was damaged by their alleged procedural due process violation, the record reveals that Bailey adequately proved damages. Medical experts for both sides testified that Bailey's mental condition was the result of the arrest, his suspension, and all events that followed. See, e.g., Tr. 30-564-20; Tr. 23-571-113, 189, 190. Thus, we reject Caldwell and Hayes argument that Bailey did not prove that the alleged procedural due process violations were a cause of his mental deterioration. There is ample support in the record to conclude that a reasonable jury could have found that the claimed procedural due process violations were a significant cause of Bailey's physical and mental damages.

247, 264, 98 S.Ct. 1042, 1052, 55 L.Ed.2d 252 (1978). Continuing Judge Fay's suggested analysis, the issue of Bailey's mental and physical damages was properly before the jury. Furthermore, the district court's refusal to give Caldwell and Hayes' requested instruction allowed the jury to consider all of the damage testimony they had heard throughout five weeks of trial. No instruction could have taken away all the testimony the jury heard regarding Bailey's conspiracy and false arrest claims. However, an instruction such as the one Caldwell and Hayes requested could have explicitly cautioned the jury that it should not consider damages attributable to the lawful arrest. The district judge's refusal of this instruction, combined with the failure of the instructions as a whole to specify the damages the jury could properly consider, prejudiced Caldwell and

Hayes.[23]

In summary, as to Caldwell and Hayes' appeal, we find that the aggregate effect of several errors warrants reversal of the jury's verdict against Caldwell and Hayes: the district court's refusal to exclude juror Johns, its refusal of Caldwell and Hayes' requested damage instruction, its error in submitting Bailey's name-clearing hearing claim to the jury, and the substantial doubt and question raised by its refusal to sever the procedural due process claims from the other claims. We also find that the district court correctly denied Caldwell and Hayes qualified immunity with respect to Bailey's postdeprivation procedural due process claims. Thus, a new trial is necessary.[24]

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[23] Caldwell and Hayes unsuccessfully objected to the damage instructions given. Tr. 42-577-70.

[24] While we have considered the possibility of remanding solely on the issue of damages, this would not be appropriate for several reasons.

IV.

Accordingly, we AFFIRM the district court's elimination of all defendants except for Caldwell, Hayes and Allison. We REVERSE the district court's summary judgment for Allison on Bailey's procedural due process claim. We REVERSE the jury's verdict for Caldwell and Hayes,

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Foremost, we cannot say that the prejudicial jury instructions on damages, combined with the presence of juror Johns, who we have decided should have been excluded for cause, affected only the jury's assessment of damages against Caldwell and Hayes. Furthermore, we have also decided that Allison should have gone to the jury as well as Caldwell and Hayes and have noted considerable confusion throughout this trial on the procedural due process claims and the window of liability that was open against the defendants. We have also determined that the name clearing hearing issue should not have gone to the jury and have expressed doubts regarding the decision to not sever the due process claims from the dramatic claims regarding Bailey's lawful arrest. Thus, the cumulative effect of these problems is substantial enough to warrant a new trial for Caldwell, Hayes and Allison on the issue of Bailey's postdeprivation procedural due process claims. We note that Alachua County was not affected by the confusing damage instructions because the jury did not find the county liable on any of Bailey's claims. Our exhaustive review of the record in this case supports the jury's verdict that Bailey made no evidentiary showing on which a jury could reasonably find Alachua County liable.

and REMAND for a new trial against Caldwell, Hayes and Allison on Bailey's postdeprivation procedural due process claims. We AFFIRM the jury's verdict in favor of Alachua County. The elimination of the majority of original defendants and claims will lead to a much simpler and straightforward trial on remand. All that remains for the new trial is Bailey's postdeprivation procedural due process claim against Allison, Caldwell and Hayes. Bailey's motion for fees pursuant to 42 U.S.C. s 1988 is moot at this time.

APPENDIX B

ORDER OF THE DISTRICT COURT OF THE NORTHERN DISTRICT OF FLORIDA JULY 2, 1990

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF FLORIDA
GAINESVILLE DIVISION

GREGG FITZGERALD BAILEY and
LIZZIE SHIRLEY BAILEY,

Plaintiff,

v. CASE NO. GCA 88-10198-MMP

BOARD OF COUNTY COMMISSIONERS OF ALACHUA COUNTY, FLORIDA; ET AL, [Clerk's stamp omitted in printing; filed July 2, 1990]

Defendants.

ORDER

Various defendants have filed motions to dismiss and for summary judgment. Based upon the following discussion, the motions are granted in part and denied in part.

OVERVIEW

This case arises out of the alleged false imprisonment of Gregg Fitzgerald Bailey, an Alachua County Detention Center (ACDC) officer. He alleges that he was a victim of an illegal sting operation conducted by officers of ACDC, officers

from three agencies acting as members of the Combined Narcotics and Organized Crime Unit (NOCU), and members of the state attorney's office.

Inmate Charles Jerkins was implicated in an April, 1987, escape attempt from ACDC, in which two other inmates were caught with hacksaw blades. Neither of the other inmates implicated Bailey. However, Jerkins suggested that a "professional" person was involved and promised cooperation in exchange for a transfer to a different area of the jail with more privileges.

The investigating officer at ACDC, Lt. Gary Brown, conferred with ACDC Assistant Director Tom Allison about the matter. Allison then conferred with ACDC Director Nate Caldwell, who authorized him to contact State Attorney Whitworth. WIth this approval, Allison instructed Brown to contact Whitworth. Whitworth instructed

his investigator, John Tileston, to help ACDC. Tileston then contacted Basil Roundtree, commanding officer of NOCU, requesting help in executing the sting against Bailey.

The sting went as follows. On May 13, 1987, Jerkins was permitted to make a telephone call to Bailey. NOCU investigator Farnell Cole obtained bugging equipment and $500 from NOCU and took it to ACDC. With Allison's approval, recording equipment was set up in his office. Jerkins was brought to the office where ACDC Lt. James Strauss attached a body bug and gave him the $500.

When Bailey arrived for his shift late that evening, he told Strauss that an inmate had contacted him that afternoon, wanting him to take something out of the jail. Strauss allegedly told Bailey that he needed physical evidence before he could do anything about Jerkins. In the

early morning, Bailey also told fellow ACDC officer C.W. Phillips about Jerkins' call the prior afternoon. In addition, Bailey told Phillips that he had previously written to ACDC Chief of Security, Maj. Stephen Garrahan, and had talked to Strauss on several occasions about Jerkins improper contacts.

At about 6 a.m. on May 14, 1987, Jerkins and other inmates were allowed to enter the day room. A few minutes later, Jerkins signaled Bailey to come to the barred door separating the day room from Bailey's duty station. Jerkins handed a sock stuffed with $500 to Bailey. Bailey took the sock to a nearby desk, wrapped the money in a clean piece of paper, put the package in an unlocked drawer and returned the sock to Jerkins. Bailey asserts that he then tried twice to call his supervisor.

Bailey also asserts that he then saw inmate trustees approaching the unlocked

desk as they brought breakfast to the other inmates. Thinking the money was at risk in the desk, Bailey put the money in his pocket and began supervising the inmates' meal. A few minutes later, Bailey was arrested for introducing hacksaw blades into the jail to aid an attempted prison escape. Immediately after the arrest, Bailey was given a letter informing him that dismissal proceeding would be started if he did not rectify the prerequisites of his job within 15 days. Bailey spent four days in jail before being released on bond. Effective May 26, 1987, he was suspended without pay until further notice.

On May 14, 1987, NOCU issued a news release about Bailey's arrest to the Gainesville area media. Caldwell and Allison also made statements about the arrest to WCJB television.

On July 8, 1987, the State Attorney's

office filed criminal charges against Bailey for bribery, unlawful compensation and unlawful introduction into or possession of $500 in ACDC. On November 24, 1987, a nolle prosequi was entered for all charges against Bailey.

After the charges were dropped, Bailey wrote Caldwell requesting reinstatement with back pay and asking for a hearing if his request was denied. On December 7, 1987, Allison wrote Bailey, denying his request. No hearing was held. On December 8, 1987, Garrahan wrote to the Florida Department of Law enforcement (FDLE) regarding an investigation of Bailey. FDLE stated in a June 9, 1988, letter that there was no basis for further action against Bailey. Caldwell requested the investigation be reopened, and the investigation remains open today.

Bailey was ordered to return to work on June 20, 1988, and was informed that he

would receive back pay. His psychiatrist advised against returning to work. Bailey presented a letter from his psychiatrist to ACDC and requested to be placed on sick leave. This request has never been granted.

ELEVENTH AMENDMENT IMMUNITY

Hindery, who is sued only in his official capacity as Alachua County Sheriff, asserts that he is a state officer and, therefore, entitled to summary judgment based on eleventh amendment immunity. As authority, Hindery relies on Hamm v. Powell, 874 F.2d 766, 770 (11th Cir. 1989), modified on reh'g, 893 F.2d 293 (11th Cir. 1990), cert. denied sub nom., Hamm v. Norred, No. 89-1699, 1990 WL 60615 (U.S. 5. Ct. June 18, 1990). In that case, the court simply stated that Florida sheriffs are state officers and cited Beard v. Hambrick, 396 So. 2d 708 (Fla. 1981), to its statement.

Id. at 770 & n.3.

On rehearing, the Eleventh Circuit withdrew the portion of its opinion discussing eleventh amendment immunity, simply stating that it need not reach that question. That question, however, clearly needs resolution in this case.

Plaintiffs assert that the decision in the original Hamm opinion is in conflict with other Eleventh Circuit decisions holding that Florida sheriffs are county officers and, as such, are not entitled to eleventh amendment immunity. Plaintiff's assertion is very persuasive. Based on the following discussion, summary judgment on the issue of eleventh amendment immunity for Hindery is DENIED.

In Lundgren v. McDaniel, 814 F.2d 600, 605 & n.4 (11th Cir. 1987), another Eleventh Circuit panel noted that under the Florida Constitution, sheriffs are county officers. That panel concluded

that the eleventh amendment did not bar suit on a pendant state claim against a sheriff, because he was not a state officer. Again in Lucas v. O'Loughlin, 831 F.2d 232, 234-35 (11th Cir. 1987), cert. denied sub nom., St. Johns County v. Lucas, 108 S. Ct. 1595 (1988), an Eleventh Circuit panel determined that "although elected by virtue of state law, he was elected to serve the county as sheriff." Id. (emphasis added). Under this scenario, actions of the sheriff were actions of the county. Finally, in Owens v. Fulton County, 877 F.2d 947, 950 (11th Cir. 1989), a panel ignored the original Hamm, decided less than two months earlier, and cited Lucas for the proposition that the court relies on state law in determining whether sheriffs are county officers.

The Florida Supreme Court case erroneously cited in Hamm for the proposition that Florida sheriffs are

state officials, actually states unequivocally that sheriffs are county officers. "In our opinion, there is no reasonable way to construe article VIII, section 1, [of the Florida Constitution] other than to include sheriffs as well as other named county officers as part of a county . . . ." Beard, 396 So. 2d at 711. The Florida Supreme Court determined that as part of the county, sheriffs were subject to Florida's statute waiving sovereign immunity for "state agencies or subdivisions" which, under the act, included "counties and municipalities." Id. at 711-12, 709 n.1.

Apparently in Florida, sovereign immunity is much broader (including municipalities and local governments) than eleventh amendment immunity. The eleventh amendment shields only states from suit in federal court, and there is no indication that Florida, instead of Alachua County,

would have to provide funds to pay a judgment against Sheriff Hindery. See Lucas, 831 F.2d at 234 (counties liable for sheriff's department salaries and expenses); Lundgren, 814 F.2d at 605 n.4 (no facts to support contention that judgment against sheriff's office must be paid from state treasury rather than from county funds); Hill v. Department of Corrections, 513 So. 2d 129 (Fla. 1987), cert. denied, 484 U.S. 1064, 108 S. Ct. 1024 (1988) (sovereign immunity and eleventh amendment immunity are distinct concepts).

QUALIFIED IMMUNITY

Several defendants assert that they are entitled to qualified immunity for their actions concerning Bailey. James Strauss and Gary Brown are lieutenants with the Alachua County Department of Corrections. Tom L. Allison is the assistant director of ACDC. Nate Caldwell is the director of

ACDC. Stephen A. Garrahan is chief of security for ACDC. Colleen Hayes is personnel director of ACDC. Farnell Cole is a deputy sheriff assigned to NOCU. And finally, John Tileston is an investigator with the state attorney's office.

The qualified immunity defense was articulated by the Supreme Court in Harlow v. Fitzgerald, 457 U.S. 800, 102 S. Ct. 2727 (1982). In Harlow, the Court held that "government officials performing discretionary functions generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." Id. at 818, 102 S. Ct. at 2738. The Supreme Court further explained this "objective (albeit fact-specific)" test in Anderson v. Creighton, 107 S. Ct. 3034, 3040 (1987). The relevant question in each

case is "whether a reasonable officer could have believed [his or her conduct] to be lawful, in light of clearly established law and the information [he or she] possessed." Id. at 3040 (emphasis added).

Bailey asserts that reasonable people in these defendants' positions would have known an arrest without probable cause violates clearly established law. After Creighton, however, this assertion sweeps too broadly. The relevant inquiry is whether each individual would have known that his or her actions violated clearly established law in light of the information that individual possessed at the time. Therefore, each individual must be considered separately to determine whether qualified immunity applies.

Bailey asserts that inquiry into the actual knowledge of each individual is not necessary. He suggests that in a

conspiracy, as alleged in this case, each conspirator is charged with the knowledge and illegal actions of all co-conspirators. This is because each conspirator is considered the agent of every other conspirator.

Bailey's argument fails on one important point. To be held accountable for the wrongful acts of a conspiracy, one must be aware of the illegal purpose of the conspiracy. Merely "conspiring" or working together to make what appeared to be a legal arrest would not subject an individual to liability for the illegal acts of co-workers. Thus, what an individual actually knew or reasonably should have known is an important factor to consider in determining whether he or she entered an illegal conspiracy or is entitled to qualified immunity.

Bailey asserts that he told both Garrahan and Strauss that Jerkins had made

several attempts to get Bailey to smuggle contraband into the jail. The last time Bailey told Strauss that Jerkins had made an improper contact was the day of Bailey's arrest. Bailey states that Strauss told him that he needed physical evidence before anything could be done about Jerkins' actions. Supported by depositions, consideration of these facts in the light most favorable to Bailey casts considerable doubt on whether a reasonable officer could have thought there was probable cause to arrest Bailey. Given the regulation requiring officers to confiscate contraband, the fact that Bailey had the $500 in his pocket does not save these defendants. Therefore, qualified immunity for Garrahan and Strauss is DENIED.

Facts about whether Tileston checked Jerkins' reliability and the results of any check are in dispute. See Plaintiff's

reply to motion of defendants Hindery and Cole for summary judgment at 11 (entered on docket Sept. 5, 1989) (Doc. 276). In addition, Tileston himself stated that at the time of the arrest he was not certain that Bailey had done anything wrong. Tileston deposition vol. 1, p. 55. These facts are material to the question of whether Tileston reasonably could have believed he had probable cause to conduct the sting and arrest Bailey.

Therefore, summary judgment based on qualified immunity for Tileston is DENIED.

There are no allegations that Brown, Allison, Caldwell, Hayes or Cole knew or should have known that Bailey had reported improper contacts by Jerkins. Nothing from the record indicates that they had reason to question Jerkins' reliability, especially in light of their reasonable assumption that Tileston had checked Jerkins' credibility. They should be able

to rely on other officers' assessments of probable cause, absent some knowledge of their own sufficient to make them question probable cause. Bailey suggests that these defendants should have known that Jerkins was a hardened criminal, inveterate liar and manipulator whose allegations could not be relied upon to provide probable cause. This assertion, however, is unsupported by allegations of specific instances which would cause the defendants to question Jerkins. Many a case has been won on the testimony of "hardened criminals." Individuals in these defendants' positions reasonably could have relied on their fellow workers' assessments of probable cause. Therefore, summary judgment for Brown, Allison, Caldwell, Cole and Hayes on the issue of qualified immunity regarding the sting and arrest of Bailey is GRANTED.

With regard to Bailey's initial

suspension without pay from his job as a corrections officer, qualified immunity is GRANTED to Brown, Allison, Caldwell, Hayes and Cole. They reasonably believed that Bailey's suspension without pay without a predeprivation hearing was lawful, considering the seriousness of the charges against him. As mentioned above, they had no reason to question whether probable cause supported the charges. Qualified immunity for Garrahan, Strauss and Tileston is DENIED on the issue of the initial suspension.

Bailey's continued suspension without a hearing is a different matter. Although some delay between the deprivation and the hearing does not necessarily violate due process, Bailey has <u>never</u> received a hearing. The law is clear that Bailey was due some process within a reasonable time. Certain facts about who could have granted a hearing are missing from the record and

are necessary to determine who, if anyone, is entitled to qualified immunity on this issue. Because material facts are absent regarding Brown, Allison, Caldwell or Hayes (all ACDC employees), summary judgment regarding Bailey' s continued suspension without a hearing is DENIED. However, qualified immunity for Cole is GRANTED. As a member of NOCU, Cole was not in a position to provide post-deprivation relief to Bailey.

A similar result is reached regarding damage to Bailey's reputation. Any participation by Strauss or Garrahan in publication to the news media of Bailey's arrest for the allegations against him is not shielded by qualified immunity. As Hayes, Allison, Caldwell, Brown and Cole were not in possession of the same information as Strauss and Garrahan, they are GRANTED qualified immunity for any participation in the initial publication

to the news media of accusations against Bailey.

The presence of stigmatizing information in Bailey's personnel file also implicates the liberty interest under the due process clause of the fourteenth amendment. See Buxton v. City of Plant City, 871 F.2d 1037, 1045 (11th Cir. 1989). Due process requires that Bailey be afforded a "name-clearing hearing" and notice of the right to such a hearing. Id. at 1046. Although for the purpose of qualified immunity this right as applied to information in a personnel file was not clearly established in this circuit until May 1, 1989, see Buxton, supra, the harm is ongoing and Bailey still has not been given a hearing. Therefore, those in charge of Bailey's personnel files and those who could grant a name-clearing hearing to him are not entitled to qualified immunity for their continued failure to provide a hearing.

As the record does not clearly indicate who is in charge of Bailey's files and who can grant a hearing, the motion for qualified immunity on this issue is DENIED.

As shown above, Cole is entitled to qualified immunity on all federal causes of action. Therefore, all pendent claims against Cole are DISMISSED WITHOUT PREJUDICE. However, this court would be open to a motion to reconsider the dismissal without prejudice if the statute of limitations has run on the state claims. See Roper v. Edwards, 815 F.2d 1474, 1477-78 (11th Cir. 1987).

RESPONDEAT SUPERIOR

Hindery, Alachua County and Gainesville assert that they were not involved in any of the actions which allegedly caused violations of Bailey's civil rights. Thus, they suggest that they are entitled to summary judgment, because respondeat

superior is not a viable theory of liability under 42 U.S.C. § 1983. See Monell v. Department of Social Servs., 436 U.S. 658, 691, 98 S. Ct. 2018, 2036 (1978).

Bailey asserts that he does not allege liability on the basis of respondeat superior. Rather, he states that each of these defendants is directly liable for acts pursuant to their policies or customs as those terms have been construed and applied by the Supreme Court in City of St. Louis v. Praprotnik, 485 U.S. 112, 108 S. Ct. 915 (1988), and Pembaur v. Cincinnati, 475 U.S. 469, 106 5. Ct. 1292 (1986)

Case law is clear that vicarious or respondeat superior liability is not available under 42 U.S.C. § 1983. Monell, 436 U.S. at 691, 98 S. Ct. at 2036. Unless defendants were personally involved in the actions giving rise to a section

1983 claim, they may not be held liable unless they established some practice or policy which made the actions likely to occur. Id.

Although liability without personal involvement requires some policy, liability may be imposed for a single decision under appropriate circumstances. Pembaur, 475 U.S. at 480, 106 S. Ct. at 1298. Liability attaches only where "a deliberate choice to follow a course of action is made from among various alternatives by the official or officials responsible for establishing final policy with respect to the subject matter in question." Id. at 483-84, 106 S. Ct. at 1300 (plurality opinion). The authority to make final policy may be legislatively delegated or may be delegated by an official who possesses such authority. Whether an official has final policymaking authority is a question of state law. Id.

In this case, Alachua County is liable under section 1983 for the actions of Hindery. See Lucas v. O'Loughlin, 831 F.2d 232, 235 (11th Cir. 1987), cert. denied sub nom., St. Johns County v. Lucas, 108 S. Ct. 1595 (1988) (trial court erred in dismissing county). Thus, Bailey seeks to hold Hindery, Alachua County and Gainesville liable because they delegated policymaking authority to Basil Roundtree, the commanding officer of NOCU, who authorized NOCU's involvement in the sting. The question, then, is whether these defendants somehow delegated their authority so as to make Roundtree the official with final policymaking authority regarding which investigations to pursue and the methods used to pursue them.

NOCU was created by the agreement of the Alachua County Sheriff's Office, City of Gainesville Police Department and the University of Florida Police Department.

Voluntary Cooperation Agreement (May 22, 1986) (Doc. 159, exhibit 23) [hereinafter VCA]. The agreement provides for a governing board consisting of the Alachua County Sheriff, the Chief of the Gainesville Police Department and the Chief of the University of Florida Police Department, or their designees. VCA para. 5 (a). "The Governing Board shall be authorized as necessary with respect to the administration of this agreement to establish policy, promulgate rules and regulations, set guidelines and otherwise provide for the operation of the Combined Narcotics and Organized Crime Unit." VCA para. 5 (b). In addition, the Governing Board has "plenary supervisory authority over the personnel participating in this agreement." VCA para. 5(a). Finally, the agreement requires the Governing Board to "appoint a person who shall have the responsibility for the day-to-day command

and administration of the Combined Narcotics and Organized Crime Unit activities. Supervisory personnel from 'the respective participating agencies shall be deployed as directed by said appointee." VCA para. 5(a).

Without a doubt, the three agencies entering the agreement delegated their authority to make final policy to the NOCU Governing Board. Special difficulties arise, however, when it is contended that these policymakers delegated their authority to another official, in this case, Roundtree. It may not be possible to draw an elegant line between final policymakers and others, but the Supreme Court has provided some guidance.

> "When an official's discretionary decisions are constrained by policies not of that official's making, those policies, rather than the subordinate's departures from them, are the act of the

> ...unicipality. Similarly, when a subordinate's decision is subject to review by the municipality's authorized policymakers, they have retained the authority to measure the official's conduct for conformance with <u>their</u> policies."

<u>City of St. Louis v. Praprotnik,</u> 108 S. Ct. 915, 926 (1988) (emphasis in original). In <u>Praprotnik,</u> the mayor and aldermen developed policies regarding promotions and transfers of city employees. They also created a municipal Civil Service Commission to review and correct any improper decisions made pursuant to their policy. In fact, the Commission actually reviewed Praprotnik's case. Under this scenario, the Court found that the individuals making the employment decisions were not final policymakers and the municipality was not liable for their actions not in keeping

with city policy.

In the current case, the agreement specifically states that the Governing Board makes policy and that a person appointed by the board is responsible for the day-to-day administration of NOCU. At first glance, this seems like the situation in Praprotnik in that Roundtree "had the authority to determine how best to effectuate a policy announced by his superiors, rather than the power to establish that policy." Id. at 933 (Brennan J., concurring) (emphasis in original). Conceivably, the analysis could stop here with the conclusion that the Governing Board, not Roundtree, had policymaking authority.

However, Praprotnik recognized that a plaintiff may be able to prove a practice that, although not recognized by written law or express municipal policy, is so widespread and well-settled as to have the

force of law. Praprotnik,108 S. Ct. at 926. In that sort of situation, the municipality is held liable for the injuries inflicted pursuant to its "practice." It appears from Roundtree's testimony that the Governing Board never established policy to guide or constrain Roundtree's discretion.

Roundtree stated that there is no written document which prescribes the parameters of when NOCU could become involved in an investigation. Roundtree, 19. With regard to operations and procedure, Roundtree stated that he and his second-in-command, Lt. Morrow, maintain a NOCU manual which they update by adding or deleting materials as they see fit.

Although the Governing Board theoretically supervises all NOCU personnel, Roundtree did not obtain and did not feel he needed approval from

anyone to involve NOCU in an investigation. As commander, he had the authority to make those decisions. Roundtree, 19. Finally, nothing in the record indicates that the Governing Board actually reviewed Roundtree's decisions. Thus, it appears that the Governing Board's practice and custom was to give unfettered discretion, amounting to policymaking authority, to Roundtree.

This case appears similar to the situation in Pembaur v. City of Cincinnati, 475 U.S. 469, 106 S. Ct. 1292 (1986). In Pembaur, sheriff 's deputies were unable to get consent to enter a doctor's office to serve arrest warrants on other individuals. Following standard office procedure, the sheriff's office requested advice from the prosecutor's office and then followed the prosecutor's instructions, axing down the doctor's door. The Court determined that under

these circumstances, the authority to make final policy had been delegated to the prosecutor. Thus, the sheriff was liable for the prosecutor's decisions.

In the present case, Roundtree decided when to involve NOCU in investigations and what methods would be used to pursue those investigations. He was the final authority. From the record, it appears that his authority was not circumscribed by the Governing Board's policy or oversight. Thus, Roundtree was the official with authority to make final policy for Hindery, Alachua County and Gainesville regarding NOCU investigations and tactics. Therefore, they are liable for Roundtree's actions under section 1983.

Gainesville admits that it delegated final policymaking authority regarding NOCU to the NOCU Governing Board pursuant to the voluntary cooperation agreement.

Gainesville trial brief at 2 (entered on docket Sept. 20, 1989) (Doc. 308). The same analysis that would make Hindery liable for the actions of NOCU applies to Gainesville. See above discussion. Gainesville, however, correctly points out that the voluntary cooperation agreement had expired. Therefore, the city asserts that the delegation of its authority had ended. Gainesville's assertion is without merit.

The Supreme Court has recognized that, although not recognized by written law (or in this case, an existing contract) or express municipal policy, a practice may be so widespread and well settled as to have the force of law. City of St. Louis v. Praprotnik, 108 S. Ct. 915, 926 (1988). Although the parties to the cooperation agreement did not renew the agreement when it expired, they continued to operate as though it were still in force. Thus, the

city's policies evidenced by the written agreement continued to operate with the force of law after the writing expired.

Gainesville's assertion that it cannot be held responsible for the actions of sheriff's deputies assigned to NOCU is also without merit. The effect of the cooperation agreement is to create a combined law enforcement unit composed of officers from the city, county and university. Once assigned to the unit, the officers are given assignments and act without regard to which entity assigned them to NOCU. Furthermore, NOCU acts equally on behalf of all of the parties to the cooperation agreement. Thus, regardless of who pays NOCU officers, they are all agents for each party to the cooperation agreement; and each party to the agreement is liable for NOCU officers' actions as though they were their own employees.

Bailey also alleges that application of the county's employment policies regarding suspension failed to provide due process when applied to his situation. Bailey's suspension was pursuant to the following policy: "loss of necessary prerequisites or abilities to perform the job (15 calendar days shall be given to regain prerequisites or abilities. If not regained, dismissal is warranted)." Alachua County Personnel Regulations, part VI § 3.1. Alachua County makes no assertions regarding the adequacy of its policy in its motion for summary judgment.

Furthermore, Bailey asserts that once the commissioners had notice of wrongful actions against him, they did nothing to rectify them. Among other things, Bailey asserts that the commissioners' failure to provide a name-clearing hearing or to remove mention of the arrest, suspension and investigation from his personnel file,

is a continuing wrong for which the county is directly responsible.

Summary judgment based on respondeat superior is DENIED.

PROBABLE CAUSE

Several defendants assert that they are entitled to summary judgment on the issue of probable cause. Summary judgment on this issue should be denied because material facts are in dispute. See Fed. R. Civ. P. 56.

To determine which facts are "material," one must know the standard which will determine the issue. Officers have probable cause to arrest when "the facts and circumstances within the collective knowledge of the law enforcement officials, of which they had reasonably trustworthy information, are sufficient to cause a person of reasonable caution to believe that an offense has been or is being committed." Wilson v. Attaway, 757

F.2d 1227, 1235 (11th Cir. 1985) (emphasis added) (quoting United States v. Pantoia-Soto, 739 F.2d 1520, 1523 (11th Cir. 1984), cert. denied, 470 U.S. 1008, 105 S. Ct. 1369 (1985)). In the case at hand, several facts bearing on probable cause are in dispute.

For instance, the time between Bailey's taking the money and his arrest is disputed. Bailey suggests that it was no more than ten or fifteen minutes, during which time he says he tried twice to call his supervisor about the money. Defendants suggest it was over an hour and that Bailey could have contacted his supervisor in that amount of time. If there were regulations requiring confiscation of contraband as Bailey suggests ($500 is considered contraband), then the time lapse would be important in determining whether taking the money provided probable cause to arrest or

simply showed that Bailey was following regulations.

Bailey also disputes whether Tileston really checked with other law enforcement officers to determine whether Jerkins was a reliable informant. Two officers who might have been logical choices to check with stated in their depositions that they did not recall Tileston inquiring about Jerkins' credibility.

Finally, Bailey asserts that he told Strauss, Garrahan and Phillips that Jerkins had made improper contact with him on several occasions. The last time Bailey told Strauss was the night of the sting. If proven, it would be difficult to find probable cause in light of the fact that the court must consider "the collective knowledge of law enforcement officials" in determining whether probable cause existed. Wilson, 757 F.2d at 1235 (emphasis added). Thus, summary judgment

on the basis of probable cause is DENIED.

FAILURE TO STATE A CLAIM

Defendants assert that they are entitled to summary judgment because Bailey only alleges negligent deprivation of due process under the fourteenth amendment. Merely negligent failure to provide due process fails to state a claim under 42 U.S.C. § 1983. See Daniels v. Williams, 474 U.S. 327, 106 S. Ct. 662 (1986)

The facts alleged in Bailey's first amended complaint indicate that the conduct was something more than negligent, maybe willful. Additionally, Bailey alleges that he was arrested without due process and without probable cause. This indicates a substantive claim based on Bailey's fourth amendment right not to be arrested without probable cause. Although mere negligence may not state a claim for relief from due process violations under section 1983, just what mental state is

required depends on which right is violated. Daniels v. Williams, 106 S. Ct. 662 (1986). As mentioned above, Bailey has provided affidavits supporting alleged facts which, if proven, would show something more than mere negligence.

Several defendants also assert that they did not deprive Bailey of a liberty interest (reputation). However, the fourteenth amendment protects people's liberty interest in their reputations when government actions which stigmatize their reputations are coupled with some other harm. Therefore, a state actor cannot publish false or defamatory statements about people in conjunction with altering a status recognized under state law (such as public employment) without subsequently notifying them that they have the right to a hearing to attempt to clear their names. See Paul v. Davis, 424 U.S. 693, 96 S. Ct. 1155 (1976); Campbell v. Pierce County,

741 F.2d 1342, 1345 (11th Cir. 1984), cert. denied, 470 U.S. 1052, 105 S. Ct. 1754 (1985).

Finally, Gainesville asserts that section '1983 does not permit' claims based on conspiracy. The Eleventh Circuit, however, does recognize a section 1983 cause of action for conspiracy to commit substantive section 1983 violations. See Slavin v. Curry, 574 F.2d 1256, 1261 (5th Cir), modified on other grounds, 583 F.2d 779 (5th Cir. 1978).[1]

Bailey has sufficiently stated his section 1983 claims in Counts 1-3. Therefore, summary judgment for failure to state a claim is DENIED.

LOSS OF CONSORTIUM

Defendants argue that they are entitled to summary judgment on Lizzie Shirley Bailey's claims for loss of consortium.

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[1] This case is binding precedent on the Eleventh Circuit under Bonner v. City of Prichard, 661 F.2d 1206, 1209 (11th Cir. 1981) (en banc).

They argue that there is no federal right to consortium, and section 1983 only provides redress for violations of federal rights.

Bailey asserts that state law determines what is a liberty interest entitled to due process before deprivation and that Florida recognizes a liberty interest in consortium. As authority, he cites to Board of Regents v. Roth, 408 U.S. 564, 92 S. Ct. 2701 (1972). Roth, however, does not analyze state law to determine liberty interests entitled to due process. The Supreme Court in Roth stated only that state law determines property interests entitled to due process. Id. at 572-78, 92 S. Ct. at 2706-10.

Consortium does not exist as a federal right. Gresham v. Dell, 630 F. Supp. 1135 (N.D. Ga. 1986). Thus, summary judgment in favor of all defendants on Lizzie Bailey's loss of consortium claims is

GRANTED. Lizzie Bailey claim. Accordingly, her pendant state claims are DISMISSED.

SOVEREIGN IMMUNITY

Defendants assert that they are entitled to sovereign immunity for the pendant state claims. As discussed above, sovereign immunity in Florida covers officials of municipalities and local governments. Those officials may be held liable only to the extent that sovereign immunity has been waived. Florida's waiver statute provides:

> No officer, employee, or agent of the state or of any of its subdivisions shall be held personally liable in tort or named as a party defendant in any action for any injury or damage suffered as a result of any act, event, or omission of action in the scope of his employment or function, unless such officer

> employee, or agent acted in bad faith or with malicious purpose or in a manner exhibiting wanton and willful disregard of human rights, safety, or property. . . . The exclusive remedy for injury or damage suffered as a result of an act, event, or omission of an officer, employee, or agent of the state or any of its subdivisions or constitutional officers shall be by action against the governmental entity, or the head of such entity in his official capacity, or the constitutional officer of which the officer, employee, or agent is an employee. . . Fla. Stat. § 768.28 (emphasis added).

Bailey asserts that this statute simply requires that the judge enter judgment against <u>either</u> the employee <u>or</u> the governmental entity. In other words, Bailey asserts that the statute deals

exclusively with what remedy is available and does not require a choice until the end of trial. The defendants assert that the statute requires a choice at the beginning of the suit. Plaintiffs must choose early who to sue.

The defendants' argument is supported by the statute itself and Florida case law. The statute provides that no employee "shall be held personally liable in tort or named as a party defendant." Fla. Stat. § 768.28 (emphasis added). If the statute only required a choice of remedies at the end of suit, anyone could be named. This statute, however, provides immunity against having to go to trial.

A Florida court reached the same conclusion in Wilson v. Duval County School Bd., 436 So. 2d 261, 263-64 (Fla. 1st Dist. Ct. App. 1983). The court commented that the statute is substantive and regulates whether, not when, parties

may be joined as defendants. The court found that under the joined statute "the substantive liability of the school board and its employees is mutually exclusive." Id. at 263. The employees may not be sued for negligence, and the governmental entity may not be sued for its employees' malicious or bad faith acts.

In this case, Counts 4-6 allege conduct that was take "in bad faith, with malicious purpose, in a manner exhibiting wanton and willful disregard of BAILEY's rights." Therefore, immunity for the individual defendants named in these counts is DENIED. Immunity based on this statute is GRANTED to Hindery as sheriff, Alachua County and Gainesville.

Counts 7 and 8 do not allege bad faith conduct. Therefore, immunity based on section 768.28 is GRANTED to defendants sued in their individual capacities. Immunity on these counts for Hindery as

sheriff, Alachua County and Gainesville is DENIED.

FLORIDA STATUTES § 112.532

The defendants assert that Bailey has attempted to state a cause of action in Counts 7 and 8 based on Florida Statutes § 112.532 and that the attempt must fail. Section 112.532 is often referred to as the Police Officers' Bill of Rights. It provides certain protections to officers under investigation or subject to disciplinary action by their employer. If the officer's employer fails to comply with the Police Officers' Bill of Rights, the officer may apply to the state circuit court for an injunction to restrain and enjoin the violations and to compel performance in keeping with the Officers' Bill of Rights. Fla. Stat. § 112.534.

Defendants correctly point out that section 112.534 is the exclusive remedy for violations of section 112.532. See

City of Miami v. Cosgrove, 516 So. 2d 1125 (Fla. 3d Dist. Ct. App. 1987). In Cosgrove, the officer sued the city for violations of subsections 112.532(4)&(5), which deal with notice of disciplinary action and retaliation for exercise of rights. The court held that the officer's sole remedy was through section 112.534 and, therefore, ordered that the claims for damages pursuant to section 112.532(3) be dismissed.

Florida Statutes section 112.532(3) provides:

> Every law enforcement officer or correctional officer shall have the right to bring civil suit against any person, group of persons, or organization or corporation, or the head of such organization or corporation, for damages, either pecuniary or otherwise, suffered during the performance of the

officer's official duties or for abridgment of the officer's civil rights arising out of "the officer's performance of official duties.

The Third District Court of Appeal noted that Cosgrove's claim focused on a violation of section 112.532 alone. Therefore, it did not consider whether other remedies were available under other "conceivable but unpleaded theories." Cosgrove, 516 So. 2d at 1127 n.1; see, e.g., Metropolitan Dade County v. Sokolowski, 439 So. 2d 932 (Fla. 3d Dist. Ct. App. 1983) (action for damages may be proper for constitutional procedural due process violations).

Bailey's first amended complaint alleges violations of his civil rights guaranteed by the constitution and laws of Florida. Thus, to the extent that Bailey seeks damages for violation of his rights under Florida's constitution, summary judgment

is DENIED. To the extent that Bailey seeks damages for violations of Florida Statutes section 112.532, summary judgment is GRANTED.

FLORIDA STATUTES § 448.08 ATTORNEY'S FEES

Bailey concedes that he is not entitled to attorney's fees for the pendant state claims, except for those fees spent collecting back wages from the county. Bailey asserts that he is entitled to attorney's fees for collecting back wages pursuant to Florida statutes section 448.08. Bailey is mistaken. Just because damages may be measured by the amount of lost wages, does not mean that the suit is an action for back wages. To receive attorney's fees pursuant to section 448.08, the suit must be based on the general labor regulations of Chapter 448, Florida Statutes. Buena Vista Const. v. Carpenters Local Union, 472 So. 2d 1357, 1358 (Fla. 5th Dist. Ct. App. 1985),

disagreed with by, Fewox v. McMerit Const. Co., 556 So. 2d 419 (Fla. 2d Dist. Ct. App. 1989). This suit is not based on Chapter 448. Therefore, Bailey is not entitled to fees under that chapter and all pendant claims for attorney's fees are DISMISSED. See Fox v. West Palm Beach, 383 F.2d 189 (5th Cir. 1967) (Florida follows the "American Rule").

FAILURE TO STATE A CLAIM FOR STATE CLAIMS

Defendants seek dismissal of counts alleging malicious prosecution, false arrest and imprisonment, and conspiracy. They suggest that Bailey failed to state claims for relief because he did not make sufficient factual allegations.

The complaint alleges sufficient involvement by each defendant in an arrest without probable cause to state a cause of action. See Johnson v. Weiner, 19 So. 2d 699, 700-01 (Fla. 1944). In addition, Bailey has made sufficient factual

allegations to make out a prima facie claim for malicious prosecution. See Burns v. GCC Beverages. Inc., 502 So.2d 1217, 1218 (Fla. 1987). As Bailey has sufficiently alleged facts to support the substantive counts, his factual allegations are sufficient to support his conspiracy counts. Therefore, defendants' motion to dismiss for failure to state a claim is DENIED.

PUNITIVE DAMAGES

Bailey admits that he is not entitled to punitive damages against the government entities. Therefore, all claims for punitive damages against Gainesville, Sheriff Hindery and Alachua County are DISMISSED.

DONE AND ORDERED this 2nd day of July, 1990.

Maurice M. Paul

United States District Judge

IN THE UNITED STATES COURT OF APPEALS,
FOR THE ELEVENTH CIRCUIT
March 31, 1992.

No. 91-3275

GREGG FITZGERALD BAILEY,
LIZZIE SHIRLEY BAILEY,

Plaintiffs-Appellants-

Cross-Appellees,

v.

BOARD OF COUNTY COMMISSIONERS OF ALACHUA COUNTY, FLORIDA, Eugene T. Whitworth, State Attorney of the Eighth Judicial Circuit of Florida, in his individual and official capacities, L.J. "Lu" Hindery, Sheriff of Alachua County, Florida, in his individual and official capacities, City of Gainesville, Florida, John Stanton Tileston, Sr., James Strauss, Farnell Cole, Gary Brown, Charles Jerkins, Tom L. Allison, Spencer Mann, Stephen Garrahan,

Defendants-Appellees,

NATHANIEL CALDWELL,
COLLEEN HAYES,

Defendants-Appellees,
Cross-Appellants.

On Appeal from the United States District Court for the

ON PETITION(S) FOR REHEARING AND SUGGESTION(S) OF REHEARING EN BANC

Before: ANDERSON AND DUBINA, Circuit Judges, and ESCHBACH*, Senior Circuit Judge.

PER CURIAM:

(x) The petition(s) for Rehearing are DENIED and no member of this panel nor other Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 35-5), the Suggestion(s) of Rehearing En Banc are DENIED.

( ) The Petition(s) for Rehearing are DENIED and the Court having been polled at the request of one of the members of the Court and a majority of the Circuit Judges who are in regular active service not having voted in favor of it (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 35-5), the Suggestion(s) of Rehearing En Banc are also DENIED.

( ) A member of the Court in active service having requested a poll on the reconsideration of this cause en banc, and a majority of the judges in active service not having voted in favor of it, Rehearing En Banc is DENIED.

ENTERED FOR THE COURT:

Anderson
UNITED STATES CIRCUIT JUDGE

**Honorable Jesse E. Eschbach, Senior U.S. Circuit Judge for the Seventh Circuit, sitting by designation.

No. 92-3
No. 91-2077

Supreme Court, U.S.
FILED
JUL 27 1992
OFFICE OF THE CLERK

In The

Supreme Court of the United States

October Term, 1992

GREGG FITZGERALD BAILEY,

Petitioner,

v.

BOARD OF COUNTY COMMISSIONERS OF ALACHUA COUNTY, FLORIDA, NATE CALDWELL, COLLEEN HAYES, TOM L. ALLISON, STEPHEN GARRAHAN, JAMES STRAUSS AND GARY BROWN,

Respondents.

Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

BRIEF OF RESPONDENTS IN OPPOSITION

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July 27, 1992

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COUNTERSTATEMENT OF QUESTIONS PRESENTED

1. Whether the Court of Appeals correctly affirmed the District Court's directed verdict dismissing all arrest-related claims because probable cause to arrest Bailey existed.

2. Whether the Court of Appeals correctly affirmed the District Court's final judgment based on the jury's verdict dismissing all claims against Alachua County because there was no finding of an official policy or custom which could result in any deprivation of Bailey's rights.

3. Whether the Court of Appeals correctly affirmed the District Court's orders granting Respondents qualified immunity with respect to Bailey's pre-deprivation procedural due process claims.

4. Whether the Court of Appeals correctly found no fair support in the record for the District Court's conclusion that a juror would be impartial even though doubts of bias existed.

5. Should certiorari be granted, Respondents would present two additional questions. These are stated in Respondents' Petition for a Writ of Certiorari filed sub nom. *Hayes, et al. v. Bailey*, No. 91-2077.

PARTIES BELOW

In addition to the parties named in the caption, the parties to the proceedings below were Eugene T. Whitworth, State Attorney of the Eighth Judicial Circuit of Florida, in his individual and official capacities; L.J. "Lu" Hindery, Sheriff of Alachua County, Florida, in his individual and official capacities; City of Gainesville, Florida; John Stanton Tileston, Sr.; Charles Jerkins; and Spencer Mann.

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No. 92-3
No. 91-2077

In The

Supreme Court of the United States

October Term, 1992

GREGG FITZGERALD BAILEY,

Petitioner,

v.

BOARD OF COUNTY COMMISSIONERS OF ALACHUA COUNTY, FLORIDA, NATE CALDWELL, COLLEEN HAYES, TOM L. ALLISON, STEPHEN GARRAHAN, JAMES STRAUSS AND GARY BROWN,

Respondents.

Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

BRIEF OF RESPONDENTS IN OPPOSITION

Respondents Board of County Commissioners of Alachua County, Nate Caldwell, Colleen Hayes, Tom Allison, Stephen Garrahan, James Strauss and Gary Brown respectfully request that the Court deny Gregg Fitzgerald Bailey's Petition for a Writ of Certiorari seeking review of certain aspects of the judgment and opinion of the United States Court of Appeals for the Eleventh Circuit entered on March 31, 1992.

COUNTERSTATEMENT OF THE CASE

A. The Matter In The Courts Below

In this action, filed by Gregg Bailey ("Bailey") and his wife in the District Court for the Northern District of Florida, pursuant to 42 U.S.C. § 1983 ("Section 1983") and state law, Bailey complained that he had been denied due process in connection with his arrest and suspension from his employment as a corrections officer with the Alachua County Corrections Department. All defendants moved to dismiss or for summary judgment. On July 2, 1990, the District Court entered an order granting those motions as to many of the defendants in whole or in part. (Petitioner's Appendix at 1b-51b)

At the beginning of the five-week trial on Bailey's remaining claims, on July 9, 1990, the District Court granted Respondent Allison summary judgment and dismissed him from the action. At the close of all the evidence, the court directed verdicts for a number of defendants, including Respondents Garrahan, Strauss and Brown, on the ground that the arresting officer, Tileston, had probable cause to arrest Bailey. The claims which remained were employment procedural due process claims against Respondents Alachua County, Hayes and Caldwell. Those claims were submitted to the jury which returned a verdict in favor of the County and against Hayes and Caldwell.

Bailey appealed to the Eleventh Circuit Court of Appeals the District Court's judgments in favor of the majority of the defendants. Caldwell and Hayes cross-appealed. The decision of the Court of Appeals was entered on March 31, 1992, upholding the District Court's

judgment with respect to all defendants except Allison, Caldwell and Hayes. The Court of Appeals reversed the District Court's granting of qualified immunity to Allison and affirmed its denial of qualified immunity to Caldwell and Hayes with respect to certain post-deprivation procedural due process claims. The Court of Appeals remanded the case for a new trial of Allison, Caldwell and Hayes.

On June 1, 1992, the Court of Appeals denied Bailey's suggestion for rehearing en banc. (Petitioner's Appendix 1c-2c) On June 4, 1992, Hayes and Caldwell filed with the Court of Appeals their motion for stay of the mandate pending consideration by this Court of their Petition for a Writ of Certiorari. On June 26, 1992, Hayes, Caldwell and Allison filed their Petition with this Court, requesting that the Supreme Court consider two questions on the issue of qualified immunity. That Petition is styled *Hayes, et al. v. Bailey*, No. 91-2077. On June 29, 1992, Bailey filed this Petition.

B. Counterstatement of the Facts

In summarizing the facts for review, Petitioner apparently does not contend that the courts below erroneously relied on any disputed facts. Rather, Petitioner simply states his version of the facts and bases his arguments for granting the Petition on them.[1] However, the material

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[1] In Petitioner's statement of the case, he refers to many alleged undisputed facts without record citation. Pursuant to

(Continued on following page)

facts, as relied on by the Court of Appeals, and supplemented by the District Court record, are as follows.

Bailey, a former corrections officer at the Alachua County Department of Corrections (ACDC), developed a relationship with an inmate, Charles Jerkins. The relationship dated from December 1986 when Bailey was assigned to guard Jerkins in the hospital. On April 22, 1987, several inmates attempted to escape from ACDC by sawing a window with hacksaw blades. (Petitioner's Appendix at 4a-6a) The attempt was foiled.

Prior to the escape attempt, Bailey had written a letter, dated February 1, 1987, to ACDC Chief of Security Garrahan, in which Bailey made vague references to illegal inmate activities. Bailey made no reference to Jerkins in the letter. Major Garrahan asked the appropriate shift lieutenant, James Strauss, to handle the matter. (Petitioner's Appendix at 28a) Strauss was of the view that Bailey was being approached by inmates just as others often were and he did not take seriously Bailey's professed concerns. (R35-567-36 to 40,105 to 107) Bailey never filled out an incident report with specific information. (R24-572-207,208) (R35-567-40)

(Continued from previous page)

Supreme Court Rule 15, Respondents note throughout this brief those facts which are material, with citation to the Eleventh Circuit's reliance on those facts, and where appropriate with citation to the trial record. Also pursuant to Rule 15, Respondents point out Petitioner's misstatements of fact and law which have a bearing on Petitioner's questions presented.

Approximately two weeks after the escape attempt, Lieutenant Brown investigated the attempt and twice Jerkins indicated that persons other than inmates were involved. Brown discussed Jerkins' statement with ACDC Assistant Director Allison and the matter was immediately referred to the State Attorney's Office. (Petitioner's Appendix at 4a) John Tileston, an investigator for the State Attorney's Office, was assigned to investigate the matter and interviewed Jerkins outside of Brown's presence. Brown told Tileston that Jerkins had said that a "professional person" had assisted in the April attempt. Brown did not give Tileston a copy of the report of his investigation. (Petitioner's Appendix at 5a)

Tileston was familiar with Jerkins as a well-known "snitch," and testified that Jerkins was a "known credible police source" and that he had verified that Jerkins had provided reliable information in the past. In his interview with Tileston, Jerkins implicated Bailey as a corrections officer who had helped obtain hacksaw blades for the April 1987 escape attempt. (Petitioner's Appendix at 5a-6a)

As a result of Tileston's discussion with Jerkins, the investigation of Bailey proceeded. Tileston determined to test whether Bailey would accept money from Jerkins and devised a plan for this purpose. The plan was devised by Tileston and was completely out of the hands of the Respondents. Tileston, with the approval of the assistant state attorney, proceeded with the pre-arrest operation. On May 13, 1987, Tileston arranged with Captain Roundtree of the Alachua County Sheriff's Department, for a recorder to be placed on Jerkins and arranged for Jerkins

to be given $500 to offer to Bailey to carry out the test. (Petitioner's Appendix at 6a)

The role of ACDC corrections officer Brown was confined to providing the State Attorney's Office with access to areas of the jail necessary for Tileston's investigation. (R28-562-165 to 167,240) (R31-565-23) (R33-566-13,14) (R38-575-22,23,26) Chief of Security Garrahan was periodically kept informed, but did not participate in any aspect of the investigation or arrest. (R31-565-21 to 23,37,38) (R33-566-13,14) (R38-575-23) The decision was made to keep the investigation quiet and limited to a certain number of people. (Petitioner's Appendix at 29a, n.8) (R31-565-38) Lieutenant Strauss was asked to help only the night before the arrest. (R33-566-15,16) (R35-567-41 to 44) (R38-575-30,31) Merely because of their jobs as ACDC lieutenants with access to both inmates and facilities, Brown and Strauss were made available to the State Attorney's Office to facilitate specific aspects of the pre-arrest operation against Bailey. (R33-566-13 to 26) (R35-567-41 to 44) (R38-575-22,23,30,31) Tileston needed help in setting up his plan and ACDC provided him with that help.

Garrahan and Strauss were not even present when Bailey was arrested, and Brown witnessed the arrest only because he was providing access to the facilities to Tileston. (R31-565-23) (R33-566-13) (R35-567-44,45,55) Garrahan did not arrive at ACDC until the morning of May 14 after the arrest. (R31-565-23) Lt. Strauss did not know about Tileston's plan until May 13, the evening before Bailey's arrest, and even then he did not recall being told that Bailey was the subject of Tileston's operation. (R33-566-16) (R35-567-41 to 45,55,56,58,108,109)

Strauss first met Tileston only on the evening of May 13, 1987, when Tileston was orchestrating the pre-arrest operation against Bailey. (R35-567-55 to 58) (R38-575-30,31)

On the afternoon of May 13th, although not instructed to do so, Jerkins called Bailey asking him to take something out of the jail for him. Bailey testified that he mentioned something to Strauss in passing as Strauss was leaving his shift around 11:00 P.M. on May 13th to go home, but in vague terms without reference to Jerkins and Strauss did not pay much attention to it. (Petitioner's Appendix at 28a-29a) Whether Strauss told Bailey to "get physical evidence" is and always has been disputed. (R35-567-45) In fact, Strauss, who was not on duty the night of these events, had ceased being Bailey's shift lieutenant in March 1987, so that Strauss was no longer Bailey's superior. (R35-567-35,41) Despite Bailey's purported concern, he did *not* tell his superior, Corporal Sullivan, who *was* on duty that night. (R24-572-211) (R35-567-8 to 12) (R25-573-65,66)

Later that night, at around 12:45 A.M. (May 14), while on duty, Bailey discussed with corrections officer Phillips his contacts with Jerkins and Jerkins' afternoon phone call. (Petitioner's Appendix at 29a) Phillips advised Bailey to tell the sergeant on duty, but Bailey did not do so. Even though Bailey's passing conversation with Strauss had taken place shortly before, Bailey did not tell Phillips that Strauss had told him to get physical evidence, a statement which Strauss denies making. (Plaintiff's Ex. 46) In addition, Bailey conducted continuous rounds and head counts with Corporals Sullivan and Lampkin and engaged in conversation with them the

entire night of May 13th and did not mention his conversations with either Jerkins or Strauss to those superiors. (R24-572-209 to 211) (R35-567-8 to 14,18 to 20,114 to 118) (R36-568-37 to 39) (R38-575-52,53)

There was a general lack of communication among the ACDC personnel and none of Bailey's discussions with Strauss or others was reported to Tileston. The lack of communication was exacerbated by the undercover internal nature of the investigation. (Petitioner's Appendix at 29a) At 1:00 A.M. on the morning of May 14, 1987, Jerkins approached Bailey to tell him that Jerkins had money for him. Later that morning, Bailey accepted the $500 from Jerkins and went about his business feeding the inmates. During the period between the moment when Jerkins handed Bailey the money, through the time when Bailey was approached by Tileston, Cole and Brown, and during the period when he was being escorted to the office, Bailey did not mention that he had been given money by an inmate. When Tileston arrested Bailey, Bailey did not tell Tileston that he had mentioned the inmate contact to Strauss the night before. It was not until he was asked for the money, after he was arrested by Tileston, that Bailey turned over the money, commenting that they would find no fingerprints on it. (Petitioner's Appendix at 8a-11a)

Upon Bailey's arrest he was afforded a hearing in state court. Criminal charges remained pending against him until November 1987. At that time an investigation into Bailey's fitness to remain a corrections officer was pending with the Florida Department of Law Enforcement (FDLE). At the conclusion of the FDLE investigation in June 1988, ACDC reinstated Bailey with back pay.

(R34-481-21 to 23)[2] However, upon the advice of his doctor, Bailey did not return to work. (Plaintiff's Ex. 52) Upon the advice of his attorney, he did not cash the checks. (R32-480-29 to 32; Defendants' Exs. 4 and 5)

Contrary to the repeated assertions of Petitioner that Caldwell and Hayes approved Tileston's plan (Petition at 10, 15) and the letters written to Bailey (Petition at 15, 16), Caldwell and Hayes were not apprised of the circumstances surrounding Bailey's situation. For example, the first time Hayes saw Bailey's November 19, 1987 letter was at her deposition in January 1989. (R32-480-103 to 105) Both Caldwell and Hayes were copied on the December 7, 1987 letter, but neither were consulted about its contents. The letter said nothing about "suspension," but merely referred to "leave without pay." (R32-480-32 to 34) (R34-481-17) (P. Ex. 11F)

SUMMARY OF REASONS FOR DENYING THE WRIT

Petitioner's factual and legal misstatements alone warrant denial of his Petition for a Writ of Certiorari, because such misstatements render it impossible for this Court to even consider the questions presented. Moreover, the Eleventh Circuit Court of Appeals correctly decided each of the issues presented by Petitioner in accordance with both Eleventh Circuit and Supreme Court precedent. In addition, Petitioner raises no conflict

[2] Throughout the Petition, Bailey asserts, without supporting evidence, that he received no back pay. This is simply untrue.

among the Circuit Courts of Appeals, no conflict with decisions of this Court and no important question of federal law. The Eleventh Circuit's decision in this case regarding probable cause, governmental liability, pre-deprivation procedural due process and seating a biased juror are all soundly rooted in established law. Finally, certiorari should be denied because Petitioner has failed "to present with accuracy, brevity and clearness whatever is essential to a ready and adequate understanding" of the questions presented, as required by Supreme Court Rule 14.5.

REASONS FOR DENYING THE WRIT

I. The Court of Appeals correctly affirmed the District Court's directed verdict dismissing all arrest-related claims because there existed probable cause to arrest Bailey.

Petitioner's framing of this question is entirely dependent upon his misstatement of fact that the Respondents "knew Bailey to be innocent." (Petition at 20, 23, 24) This misstatement is not supported by the evidence. In fact, the majority of the evidence reveals that the Respondents did *not* know about Bailey's activities, his relationship with Jerkins, or his frame of mind. Nor is there evidence that any of the Respondents had concluded that Bailey was guilty or innocent with respect to any aspect of the situation confronted by Tileston, the arresting officer.

Petitioner also misrepresents the conclusion of the courts below by stating that he was subject to a "false

arrest." (Petition at 20, 23) The District Court and then the Eleventh Circuit concluded that Tileston had probable cause to arrest Bailey. (Petitioner's Appendix at 25a) Even though Petitioner is not challenging in this Petition the conclusion that probable cause to arrest existed, he bases his first question on the premise that Tileston did not have probable cause – an assumption that is unsupported by the facts found in the District Court and unsupported by the Eleventh Circuit's opinion.

As succinctly stated by the Eleventh Circuit: "The flaw in Bailey's efforts to undermine Tileston's probable cause is that Bailey's version of the facts failed to create a substantial conflict in what Tileston knew at the time of the arrest. . . . Although the lack of communication among ACDC personnel is unfortunate, none of Bailey's prior discussions was reported to Tileston." (Petitioner's Appendix at 27a, 28a) For example, Bailey makes much of Brown's failure to tell Tileston about Brown's report on the April 1987 escape attempt. (Petition at 21) The Eleventh Circuit specifically addresses this issue and disposes of it: "Bailey, however, overstates the significance of this omission. . . . The report would not have definitively established the source of the hacksaw blades used in that escape attempt, nor would it have ruled out the possibility that another escape attempt (involving Bailey) was being formulated." (Petitioner's Appendix at 30a)

Even if Petitioner's misstatements of fact do not foreclose consideration of this question, the Eleventh Circuit's statement of the law is settled and undisputed. The Eleventh Circuit correctly explained the law supporting its conclusion that once probable cause for arrest is found, no Section 1983 liability can attach. In spite of

Petitioner's statement that the Eleventh Circuit applied an "unexplained rule of law" (Petition at 23), this Court explained in *Pierson v. Ray*, 386 U.S. 547 (1967), that this doctrine stems from tort law standards as this Court has applied them to Section 1983 claims. In discussing *Pierson v. Ray*, the Fifth Circuit explained that probable cause is a defense to a claim of false arrest under Section 1983 "not because of any language in Section 1983, but because Section 1983 must be read in a manner consistent with the background of tort liability." *Whirl v. Kern*, 407 F.2d 781, 788 (5th Cir. 1969) *quoted in Rodriguez v. Jones*, 473 F.2d 599, 604-605 (5th Cir. 1973).

The most recent pronouncement of this settled principle in the Eleventh Circuit, *Marx v. Gumbinner*, 905 F.2d 1503 (11th Cir. 1990), was correctly cited by the Eleventh Circuit in this case. *Marx* and the principle it stands for could not be clearer and is fully supported by Supreme Court precedent. There is no split among the Circuits and Petitioner provides no legal argument for ignoring established precedent.

By virtue of the Petitioner's convoluted argument regarding alleged knowledge of Respondents who were not arresting officers, he is attempting to resuscitate his oft-rejected conspiracy claim. This claim was rejected by both courts below, and is not even presented in this Petition. Both courts found a complete lack of evidence of a conspiracy. (Petitioner's Appendix at 32a-34a)[3]

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[3] Petitioner makes reference to possible discoveries that Tileston could have made after he arrested Bailey. (Petition at

(Continued on following page)

Contrary to Petitioner's impassioned viewpoint, failure to communicate is not, and cannot be, the basis for a Section 1983 claim.

II. The Court of Appeals followed this Court's holding in *City of St. Louis v. Praprotnik* and correctly affirmed the District Court's final judgment dismissing all claims against Alachua County because there was no evidence of an official policy or custom which could result in any deprivation of Bailey's rights.

The factual and legal misrepresentations committed by Petitioner in this argument are designed to obfuscate the obvious conclusion to be drawn from reading the Eleventh Circuit's opinion together with this Court's opinion in *City of St. Louis v. Praprotnik*, 485 U.S. 112 (1988) – that the County Commission was the final policy-making authority for the County personnel policy and that policy is not responsible for any constitutional deprivations claimed by Bailey.

The fundamental premise upon which Petitioner bases his argument regarding governmental liability is on

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23, 25) However, the law is also clearly settled that the existence of probable cause is to be judged at the time of the arrest. Subsequent events or proceedings have no bearing on the existence of probable cause for purposes of determining Section 1983 liability. "Once probable cause has been established, the legality of the arrest is not affected by collateral bad faith of the arresting officer or a subsequent dismissal or acquittal of the charges." *Howell v. Tanner*, 650 F.2d 610, 615 (5th Cir. Unit B 1981). *See also Hunter v. Clardy*, 558 F.2d 290, 292 (5th Cir. 1977).

the assumption that his constitutional rights were violated by the wrongful acts of Respondents. Petitioner goes so far as to state that "[n]o one can dispute that Bailey was repeatedly deprived of his constitutional rights by wrongful, purposeful acts of Caldwell, Hayes and Allison and that those unconstitutional acts caused him extreme and permanent injury." (Petition at 38) Respondents *do* dispute this assumption and the Eleventh Circuit certainly does not agree with this statement.[4]

Petitioner deliberately misstates the standard for determining qualified immunity of public officials in a clear attempt to bolster his argument that the defense of qualified immunity conflicts with the law of governmental liability (as enunciated by this Court in *Monell v. New York City Dept. Soc. Serv.*, 436 U.S. 658 (1978) and *City of St. Louis v. Praprotnik, supra*). Petitioner states that "Allison, Caldwell and Hayes claim (or will claim) qualified immunity on the ground that County's personnel rules were not comprehensive and clear. . . . " (Petition at 29) This statement is irrelevant to the inquiry required to determine whether a public official is qualifiedly immune from Section 1983 liability.[5] The protection of public

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[4] Another basic factual misstatement related to this question is Petitioner's repeated and incorrect statement that he was never paid. To the contrary, he received back pay and chose not to cash the checks. (R32-480-29 to 32; Defendants' Exs. 4 and 5)

[5] As fully discussed in the Petition of Respondents Allison, Caldwell and Hayes, No. 91-2077, and as enunciated by this Court in *Harlow v. Fitzgerald*, 457 U.S. 800 (1982), and *Anderson v. Creighton*, 483 U.S. 635 (1987), to determine

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officials from personal liability is completely separate and distinct from the issue of governmental liability. The two issues are not, and should not be, linked.

The unstated aim of Petitioner's second question is to convince the Court that the County should be adjudged liable on a theory of *respondeat superior*. However, this concept has clearly been rejected by this Court and by Congress. *Monell*, 436 U.S. at 691-694. In order to hold a local government liable, an official policy or custom of the government itself must be responsible for inflicting the injury. *Id*. This Court expanded further on the standard for governmental liability in *Praprotnik* and the Eleventh Circuit in this case followed that precedent without deviation.

As in *Praprotnik*, in this case there is no evidence indicating that the County Commission delegated to anyone its final authority in respect of the personnel policy set by the Commission. 485 U.S. at 128. The Eleventh Circuit correctly applied *Praprotnik* in holding that the final policy-making authority in this case rested with the County Commission. (Petitioner's Appendix at 48a)

(Continued from previous page)

qualified immunity the court must inquire whether a reasonable public official, in light of the clearly established law and the information possessed by that official, could have believed that the action taken was unlawful. *Anderson*, 483 U.S. at 641. Petitioner also misstates the Eleventh Circuit's holding with respect to Bailey's post-deprivation procedural due process claim. This issue is fully treated in the Petition of Allison, Caldwell and Hayes.

Petitioner's argument is merely a restated view that *respondeat superior* liability should apply. This Court has clearly addressed the issue of local governmental liability. As this Court stated in *Praprotnik*: "Except perhaps as a step towards overruling *Monell* and adopting the doctrine of *respondeat superior*, ad hoc searches for officials possessing such *"de facto"* authority would serve primarily to foster needless unpredictability in the application of Section 1983." 485 U.S. at 131.

This Court has fully explicated the standard for assessing local governmental liability. This case raises no new issues in that regard and certainly requires no change in the law, nor does it require this Court to fine-tune its prior decisions.

III. The Court of Appeals correctly affirmed the District Court's orders granting Allison, Caldwell, Hayes and Alachua County summary judgment with respect to Bailey's pre-deprivation procedural due process claims.

In this argument, Petitioner challenges the Eleventh Circuit's affirmance of the granting of qualified immunity to Respondents with respect to Bailey's pre-deprivation procedural due process claim. However, Petitioner once again misstates the legal analysis for qualified immunity. In the text of this third question, Petitioner misrepresents the standard as immunity from liability "merely because the exact factual situation had not been confronted before." (Petition at 39) The correct analysis is discussed by Respondents in Section II of this Opposition and is

analyzed in detail in their Petition for Writ of Certiorari (No. 91-2077).[6]

As with the other questions presented in this Petition, Bailey's misstatement of key facts make consideration of the issue raised virtually impossible. He incorrectly asserts, with no supporting evidence, that Caldwell and Hayes approved the suspension letter and that Bailey received no pay. (Petition at 40) Moreover, as in the argument Petitioner makes in connection with his first question presented, once again he is using this question as a pretext for interjecting his failed conspiracy theory. Petitioner states, in direct contradiction to the evidence and the rulings of both courts below, that "this action was prearranged by these Defendants in connection with the plan to set a trap to arrest Bailey." (Petition at 40) Even though Petitioner is not requesting review of the Eleventh Circuit's affirmance of the District Court's rejection of his conspiracy claim, he continues to raise it under the guise of other issues – none of which warrant review.

Petitioner makes these false statements and promotes these misapprehensions to lend credence to his argument that *Cleveland Board of Education v. Loudermill*, 470 U.S. 532 (1985), requires notice and a hearing before suspension

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[6] To the extent that there are issues for review in this case with respect to qualified immunity, they are as presented in the Petition of Respondents Hayes, Caldwell and Allison. If review of those issues is granted, this Court will be in a position to resolve the only issues left unresolved by the Eleventh Circuit and will also resolve the split among the Circuits regarding whether the issue of qualified immunity may be submitted to the jury.

from public employment under all circumstances. (*Loudermill* held that a delay of nine months in providing a post-deprivation hearing was not constitutionally infirm.) However, the Eleventh Circuit did not depart from the principles adopted by this Court that it had "rejected the proposition that 'at a meaningful time and in a meaningful manner' always requires the State to provide a hearing prior to the initial deprivation of property." (Petitioner's Appendix at 41a quoting *Parratt v. Taylor*, 451 U.S. 527, 540 (1981))

In this case, the Eleventh Circuit correctly pointed to the "flexibility in the constitutional requirements pertaining to a pre-deprivation hearing." (Petitioner's Appendix at 41a, n.12) The Court then applied that flexible legal standard in this case: "A corrections facility's paramount concern is security; a guard suspected of corruption compromises that security. Therefore, the defendants could have reasonably believed that this was a situation with a 'necessity for quick action' that made a pre-deprivation hearing impracticable." (Petitioner's Appendix at 42a)[7]

Petitioner raises no issue worthy of this Court's consideration in connection with pre-deprivation due process. There is no split among the Circuits and, contrary to

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[7] With respect to the suspension with pay alternative proposed by the Petitioner, as pointed out by the Eleventh Circuit, the existence of one sentence expressed in *Loudermill* in passing was not sufficient for Bailey to carry his burden of showing that suspension with pay under these circumstances was required by clearly established law. (Petitioner's Appendix at 43a, n.13)

Petitioner's contention, there has been no deviation from this Court's precedents.

IV. The Court of Appeals correctly found no fair support in the record for the District Court's conclusion that a juror would be impartial even though doubts of bias existed.

Through overstatement, misstatement and selective omission, Petitioner mischaracterizes the evidence of bias of juror Johns. The Eleventh Circuit examined the full transcript of the juror's voir dire and correctly concluded that there was no fair support in the record for the District Court's conclusion that she could or would be impartial. *See Patton v. Yount*, 467 U.S. 1025, 1038 (1984). Contrary to Petitioner's unsupported assertion that the standard of review should involve some form of "customary deference," the *Patton* standard, correctly applied by the Eleventh Circuit in this case, subsumes that concept. If there were "fair support in the record," deference would be appropriate. However, that is not the case here.

The Eleventh Circuit pointed out that "Johns testified that she knew many of the potential witnesses through her employment." (Petitioner's Appendix at 62a, citing to the trial record) The Eleventh Circuit also stated: "The record in this case leaves juror Johns' impartiality in question." (Petitioner's Appendix at 63a) Petitioner fails to mention that the District Court judge interrupted Johns at a crucial moment in her voir dire testimony. (Petitioner's Appendix at 63a) In fact, even the portions cited in the Petition itself show that "Johns' responses to

whether her connections to Bailey would make any difference to her ability to serve as an impartial juror were hesitant and equivocal." (Petitioner's Appendix at 64a and Johns' testimony reproduced at 64a, n.21)

Furthermore, Petitioner presents a garbled argument claiming that the standard applied by the Eleventh Circuit "derogates from the unfettered right of litigants such as Bailey to exercise peremptory challenges without being manipulated unfairly." (Petition at 47) Petitioner provides no support for this complaint. The argument behind this assertion is practically impossible to discern. Of the four questions presented in this Petition, this question most notably fails to accurately and clearly present "whatever is essential to a ready and adequate understanding" of the question, as required by Supreme Court Rule 14.5. This question fails utterly to express a reason for granting review.

CONCLUSION

For each of the foregoing reasons, the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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July 27, 1992

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No. 92-3

In The

Supreme Court of the United States

October Term, 1992

GREGG FITZGERALD BAILEY,

Petitioner,

v.

BOARD OF COUNTY COMMISSIONERS OF ALACHUA COUNTY, FLORIDA, NATE CALDWELL, COLLEEN HAYES, TOM L. ALLISON, STEPHEN GARRAHAN, JAMES STRAUSS AND GARY BROWN,

Respondents.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

PETITIONER'S REPLY TO BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

I. MAY GOVERNMENTAL OFFICIALS WITH LEGAL IMPUNITY TO ACTIONS UNDER 42 U.S.C. § 1983 CAUSE A PERSON KNOWN TO THEM TO BE INNOCENT TO BE ARRESTED, JAILED, AND PROSECUTED ON FALSE CHARGES BY PERMITTING A TRAP TO BE SET UP FOR HIS ARREST IN WHICH IT REASONABLY APPEARS TO THE ACTUAL ARRESTING OFFICER THAT THE INNOCENT PERSON IS GUILTY OF A CRIME THAT THE GOVERNMENTAL OFFICIALS KNOW HE DID NOT COMMIT?

II. IS THE LIABILITY OF LOCAL GOVERNMENTAL ENTITIES UNDER 42 U.S.C. § 1983 LIMITED SOLELY TO OCCASIONS IN WHICH THE ULTIMATE POLICYMAKING AUTHORITY SUCH AS A BOARD OF COUNTY COMMISSIONERS HAS ITSELF ADOPTED A SPECIFIC POLICY TO DEPRIVE CONSTITUTIONAL RIGHTS?

III. MAY GOVERNMENTAL OFFICIALS WITH IMPUNITY TO LIABILITY UNDER 42 U.S.C. § 1983 SUMMARILY DEPRIVE A PUBLIC EMPLOYEE OF PROPERTY IN HIS PUBLIC EMPLOYMENT WITHOUT NOTICE, WITHOUT HEARING, AND WITHOUT PAY MERELY BECAUSE THE EXACT FACTUAL SITUATION HAD NOT BEEN CONFRONTED BEFORE?

IV. MAY A CIRCUIT COURT OVERRIDE THE CUSTOMARY DEFERENCE AFFORDED DISTRICT COURT RULINGS ON CHALLENGES FOR CAUSE AND REVERSE A 42 U.S.C. § 1983 VERDICT FOR A CLAIMANT ON THE GROUND OF JUROR BIAS IN THE COMPLETE ABSENCE OF EVIDENCE OF ACTUAL BIAS

QUESTIONS PRESENTED – Continued

AND IN THE PRESENCE OF AN EXTENSIVE VOIR DIRE EXAMINATION OF THE JUROR IN QUESTION WHO HAD VOLUNTARILY DISCLOSED HER VAGUE KNOWLEDGE OF ONE OF THE PARTIES AND REPEATEDLY DENIED BIAS IN MODERATE AND CAUTIOUS REPLIES TO THE DISTRICT COURT'S VOIR DIRE QUESTIONS?

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No. 92-3

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Respondents.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

PETITIONER'S REPLY TO BRIEF IN OPPOSITION

Petitioner Gregg Fitzgerald Bailey provides this Reply to Respondents' Responses to his Petition For Writ of Certiorari and respectfully prays that this Court issue a writ to review the judgment and opinion of the United States Court of Appeals for the Eleventh Circuit entered on March 31, 1992

ARGUMENT IN REPLY TO RESPONDENTS' BRIEF IN OPPOSITION

In general, Respondents have failed to address the important legal issues posed by the Petition in favor of making repeated bold assertions that Petitioner has misstated the facts (Brief In Opposition, pp. 10, 11, 17), made "factual and legal misrepresentations" to this Court (Brief In Opposition, p. 13, 16), deliberately misstated standards (Brief In Opposition, p. 14), "misrepresent[ed] the standard" (Brief In Opposition, p. 16), made "false statements and promoted these misrepresentations" (Brief In Opposition, p. 17) and "mischaracterize[d] the evidence" (Brief In Opposition, p. 19). Almost without exception, Respondents have relied solely upon the utterance of these vituperative charges without presenting to this Court argument based upon the record to support them. Although Petitioner believes this not to be the place to deal with all these allegations in detail, Petitioner refers the Court to record refutation of some of them in the argument below. As to the larger point, Petitioner firmly asserts that each factual statement is based upon sufficient evidence in the record to support it and each stated question is squarely presented by these proceedings.[1]

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[1] One example of an erroneous accusation that Petitioner has misrepresented facts will be given. Respondents state that Petitioner's assertation that he has never been paid back wages "is simply untrue" (Brief in Opposition, p. 9, n.2) and is "incorrect." (Brief in Opposition, p. 14, n.2). Respondents also state, "he received back pay and chose not to cash the checks." (Brief in Opposition, p. 14). Respondents do not explain why Petitioner did not cash the checks. The facts are these. On April 11, 1988 Petitioner wrote County demanding relief. (Dep. Ex. 73). On June 15, 1988, County wrote Petitioner stating that he had

QUESTION 1. MAY GOVERNMENTAL OFFICIALS WITH LEGAL IMPUNITY TO ACTIONS UNDER 42 U.S.C. § 1983 CAUSE A PERSON KNOWN TO THEM TO BE INNOCENT TO BE ARRESTED, JAILED AND PROSECUTED ON FALSE CHARGES BY PERMITTING A TRAP TO BE SET UP FOR HIS ARREST IN WHICH IT REASONABLY APPEARS TO THE ACTUAL ARRESTING OFFICER THAT THE INNOCENT PERSON IS GUILTY OF A CRIME THAT THE GOVERNMENTAL OFFICIALS KNOW HE DID NOT COMMIT?

Respondents have attempted to divert this Court's attention from the important constitutional question presented here - i.e. does an official violate § 1983 when he causes an innocent person to be arrested, jailed and prosecuted by failing to supply the arresting and prosecuting officials with exculpatory information known to the Defendant official? – over to the factual question of

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been reinstated as of June 20, and would receive back pay. On June 15, 1988 Petitioner was advised by his psychiatrist not to return to the job at the present time. On June 20, 1988 Petitioner requested to be placed on sick leave, and requested his back pay, which he was not given. A day or two later Petitioner suffered a psychotic episode and was confined to a psychiatric hospital. Petitioner again requested back pay by letter of June 23, 1988. County still did not pay Petitioner the promised back wages. In October 1988 Petitioner commenced this litigation. In September 1989, eleven months after this litigation commenced, County mailed Petitioner a check in the amount of back wages. Upon advice of counsel, Petitioner returned the check asking County to add the endorsement that his acceptance would not release the other claims against it. (Exh. 5). County has never returned the check to Petitioner with that endorsement. Hence, Petitioner's statement that he has never been paid back wages was and remains true.

whether or not the Respondents actually knew the Plaintiff to have been innocent. (Brief In Opposition, p. 10). The record is replete with evidence to support the assertions that Defendants BROWN, GARRAHAN and STRAUSS all possessed information of Petitioner's innocence both before and after his arrest to support jury determinations that they knew Petitioner to be innocent. In fact, the Courts below took away from Petitioner the opportunity to have a jury make those findings by holding as a matter of law that the fact that the arresting officer from whom the information was withheld by Respondents had probable cause to make the arrest provided a defense to *all* Defendants.

At the time the District Court granted directed verdicts dismissing the deprivation of liberty claims against Respondents STRAUSS, BROWN, GARRAHAN and COUNTY, Petitioner's lawyer asked for clarification as to whether the action was dismissed specifically as to Respondent STRAUSS. The relevant portion of the transcript is quoted here:

(Question of Counsel To Court). "Do I understand on the false arrest that Mr. Strauss is still a Defendant?" (R-39-576-118).

To this the Court responded:

The Court: "No, because he wasn't there. He didn't do anything about the arrest. He didn't take steps to do something to head it off, *but you can't hold him civilly liable.* It was Mr. Tileston who decided to arrest him or not arrest him. *Mr. Strauss, if there was any way I could legally keep him in, I would keep him in.*" (R 39-576-118, 119). (e.s.).

Petitioner respectfully submits that the District Court and the Court below were legally wrong to conclude as a matter of law that § 1983 does not provide a remedy against these Respondents for having caused Petitioner to be deprived of his liberty without due process of law. Respondents have provided no argument to undermine the constitutional importance of this legal issue. The cases they cite, i.e. *Whirl v. Kern*, 407 F.2d 781 (5th Cir. 1969), *Marx v. Gumbinner*, 905 F.2d 1503 (11th Cir. 1990), *Rodriguez v. Jones*, 473 F.2d 599 (5th Cir. 1973), and *Pierson v. Ray*, 386 U.S. 547 (1967), all treat with the issue of probable cause as a defense for *an arresting officer* to a § 1983 action. None deals with the important issue raised in this question. Petitioner earnestly submits that the holding below – that it does not violate § 1983 to knowingly cause an innocent man to be arrested, jailed and prosecuted – deserves this Court's review.

QUESTION II. IS THE LIABILITY OF LOCAL GOVERNMENTAL ENTITIES UNDER 42 U.S.C. § 1983 LIMITED SOLELY TO OCCASIONS IN WHICH THE ULTIMATE POLICYMAKING AUTHORITY SUCH AS A BOARD OF COUNTY COMMISSIONERS HAS ITSELF ADOPTED A SPECIFIC POLICY TO DEPRIVE CONSTITUTIONAL RIGHTS?

Respondents have wholly failed to address the issue raised by this appeal – namely, does the rule of law applied by the courts below in deciding whether Respondent COUNTY had delegated final decision making authority to Respondents CALDWELL and HAYES depart from the constitutional standards laid down by this Court in *Pembauer v. City of Cincinnati*, 475 U.S. 469

(1986) and *City of St. Louis v. Praprotnik*, 485 U.S. 112 (1988). As pointed out in Petition 92-3, p. 36, the Court below held that CALDWELL and HAYES were not final decision makers solely because "final policy making authority rested in the BOARD OF COUNTY COMMISSIONERS," 956 F.2d at 1125, without ever examining the detailed evidence in the record establishing that COUNTY *had delegated* final decision making authority to Respondents CALDWELL and HAYES. Contrary to Respondent's assertion that "there is no evidence indicating that the County Commission delegated to anyone its final authority in respect of the personnel policy set by the Commission," the record is replete with evidence to this effect. This evidence is summarized in Petition 92-3, pp. 32-34, and will not be repeated here.

In sum, Respondents have provided no argument to deny the Petition to have this Court review the important legal question of whether the standard applied by the Courts below – i.e., that if a local governmental entity possesses a power it will be conclusively presumed not to have delegated it – comports with the Constitution and § 1983.

QUESTION III. MAY GOVERNMENTAL OFFICIALS WITH IMPUNITY TO LIABILITY UNDER 42 U.S.C. § 1983 SUMMARILY DEPRIVE A PUBLIC EMPLOYEE OF PROPERTY IN HIS PUBLIC EMPLOYMENT WITHOUT NOTICE, WITHOUT HEARING, AND WITHOUT PAY MERELY BECAUSE THE EXACT FACTUAL SITUATION HAD NOT BEEN CONFRONTED BEFORE?

Respondents again have sought to deflect the focus for this Court from the issue framed by Question III in

Petition 92-3. That issue is simply whether or not the Constitution requires predeprivation notice and hearing *or suspension with pay* before a tenured public employee may be pre-emptorily deprived of his property interest in his public employment. The Court below held that the Constitution imposes no such requirement. Petitioner respectfully submits that this ruling does not comport with the Constitution, conflicts with the established precedents of this Court, and needs this Court's review to protect the constitutional rights of persons in the jurisdiction of the Eleventh Circuit and elsewhere.

QUESTION IV: MAY A CIRCUIT COURT OVERRIDE THE CUSTOMARY DEFERENCE AFFORDED DISTRICT COURT RULINGS ON CHALLENGES FOR CAUSE AND REVERSE A 42 U.S.C. § 1983 VERDICT FOR A CLAIMANT ON THE GROUND OF JUROR BIAS IN THE COMPLETE ABSENCE OF EVIDENCE OF ACTUAL BIAS AND IN THE PRESENCE OF AN EXTENSIVE VOIR DIRE EXAMINATION OF THE JUROR IN QUESTION WHO HAD VOLUNTARILY DISCLOSED HER VAGUE KNOWLEDGE OF ONE OF THE PARTIES AND REPEATEDLY DENIED BIAS IN MODERATE AND CAUTIOUS REPLIES TO THE DISTRICT COURT'S VOIR DIRE QUESTIONS?

Respondents again seek to deflect this Court's focus from the important legal issue raised by Question IV in their assertion that, "through overstatement, misstatement and selective omission, Petitioner mischaracterizes the evidence of bias of juror Johns." (Brief In Opposition, p.15). Again, Respondents have made no attempt to support these charges by references to the record. Indeed, Petition 92-3, pp. 16-19, sets out the substance of most of

the voir dire that establishes Petitioner's basis for granting the Petition and demonstrates particularly how the holding of the Court below departs from the standards for reviewing jury bias repeatedly stated by this Court.

The departure of the Court below from those standards is highlighted by Respondents' assertion that, "Petitioner fails to mention that the District Court judge interrupted Johns at a crucial moment in her voir dire testimony." (Brief In Opposition, p. 19). The conclusion that the District Court "interrupted" juror Johns is based upon nothing else but a cold evaluation of the manner in which the court reporter transcribed the testimony. The transcript is printed exactly as follows:

The Court: "[Does anything about your knowledge of] Mr. Bailey that would, in any way, tend to influence your verdict in this case."

Ms. Johns: "I don't feel so at all but - -"

The Court: "Could you tell us how you know him through acquaintanceship at the hospital." [R 20-509-51].

Whether the District Court interrupted Juror Johns or whether Juror Johns merely ended her statement with a tailing "but," simply cannot be told from the cold record. On this point, the appellate courts are required by this Court's precedents to give deference to the decision of the District Court who made the on-the-site evaluation. Despite this, the Court below upended a jury verdict largely on the basis that it read the typed symbols "- -" as signifying an interruption. If appellate courts are permitted to do this, the constitutional right of trial by jury will plainly be impaired. Respondents have offered this Court

no argument to deny the importance of granting review of whether it is error for circuit courts to substitute their judgments based only on the cold record for that of the District Courts.

CONCLUSION

As demonstrated herein, Respondents have sought to deflect this Court's focus from the important legal issues raised by Petition 92-3 by accusing Petitioner, without supporting reference to the record, of repeated misstatements and misrepresentations. Petitioners adheres to each statement of fact made in Petition 92-3 as being supported by sufficient evidence in the record and to his representation that each of the legal questions posed is properly raised in these proceedings. Respondents have not given valid and sufficient reasons to deny the Writ. Accordingly, Petitioner respectfully requests that the Petition be granted.

Respectfully submitted

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August 20, 1992

92-4

FILED
JUN 29 1992
OFFICE OF THE CLERK

NO. _____

IN THE SUPREME COURT

OF THE

UNITED STATES OF AMERICA

October Term, 1991

JOHNNY MYNHIER BRADLEY
and KARL BRADLEY - PETITIONERS

vs.

JUANITA ROBINSON, FARRIS H. GILLESPIE,
and ASA R. LITTLE, JR. - RESPONDENTS

and

J.M. RICHARDSON, in his capacity
as Judge, Menifee Circuit Court - DEFENDANT

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Whether the United States of America must be made an Involuntary Plaintiff in order to protect both the pecuniary and proprietary interests of the United States of America -- as well as the interests of Petitioners -- in the lands claimed by Respondents under the *same* deeds which are the subject of the State Court Action and the Federal Condemnation Proceeding?

Whether the fundamental, time-honored principle set forth by this Most Honorable Court in *Federated Department Stores, Inc. v. Moitie*, 452 U.S. 398 (1981), that "the res judicata consequences of a final judgment on the merits [are not] altered by the fact that the judgment *may* [emphasis added] have been wrong or rested on a legal principle subsequently overruled in another case," stands affirmed?

Whether the issue of ownership to a unitary tract of land in a Federal Condemnation Proceeding must *necessarily* have been decided in order for the United States of America to duly award damages in a partial-taking case?

Whether the only adequate remedy to restrain the continuance of harassing lawsuits whose purpose is to relitigate key under-lying issues in a legally incompetent state forum is the equitable remedy of a permanent federal injunction?

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NO. _____

IN THE SUPREME COURT

OF THE

UNITED STATES OF AMERICA

October Term, 1991

JOHNNY MYNHIER BRADLEY
and KARL BRADLEY - Petitioners

vs.

JUANITA ROBINSON, FARRIS H. GILLESPIE,
and ASA R. LITTLE, JR. - Respondents

and

J.M. RICHARDSON, in his capacity
as Judge, Menifee Circuit Court - Defendant

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

Petitioners, Johnny Mynhier Bradley and Karl Bradley, respectfully pray that a writ of certiorari issue to review the Judgment and Opinion of the United States Court of Appeals for the Sixth Circuit refusing to reverse the Judgment, Order and Opinion of the United States District Court for the Eastern District of Kentucky as a matter of law. Pursuant to the Anti-Injunction Act, 28 U.S.C. §2283, the District Court was clearly authorized and required to enjoin the State Court Action in aid of its continuing jurisdiction of the Federal Condemnation Proceeding and to protect or effectuate its Judgment.

In addition, the United States of America should be made an Involuntary Plaintiff in order to protect both the pecuniary and proprietary interests of the United States of America -- as well as the interests of Petitioners -- regarding United States Government lands claimed by Respondents in the State Court Action under the same deeds which these Respondents relied upon in the 1974 Federal Condemnation Proceeding in which these lands were duly purchased by the United States of America from Petitioners.

OPINIONS BELOW

The unpublished written opinion of the United States Court of Appeals for the Sixth Circuit appears in Appendix A to this Petition. The unpublished written opinion of the District Court for the Eastern District of Kentucky appears in Appendix B to this Petition.

JURISDICTION

The Court of Appeals' Opinion in this matter was filed on March 27, 1992. A timely Petition for Rehearing Containing Suggestion For Rehearing En Banc was filed on April 8, 1992. The Court of Appeals' denial of the Petition for Rehearing was issued on May 8, 1992, and is set forth in Appendix I. This Court's jurisdiction is invoked under Title 28 U.S.C. §§ 1254(l) and 2101(c), (f).

STATUTORY PROVISIONS INVOLVED

Title 28 U.S.C. §§ 1254, 1331, 2101, 2283 and Title 40 U.S.C. §258a are set forth in Appendices K, L, M, N and O, respectively.

STATEMENT OF THE CASE

The United States District Court, Eastern District of Kentucky, Lexington Division, had jurisdiction pursuant to Title 28 U.S.C. §§ 1331 and 2283, and Rule 19(a) of the Federal Rules of Civil Procedure.

On June 28, 1974, the United States of America commenced the Federal Condemnation Proceeding to acquire a portion of the land conveyed to Mr. James W. Mynhier from the United States of America on May 4, 1944. In the Federal Condemnation Proceeding, the United States sought to condemn and take three tracts of land, two of which (3204E and 3322E) were contained within or were subsets within the Disputed Property and were based on the same source of title as the rest of the property.

Because of the existence of conflicting Deeds on the land included in Tracts 3204E and 3322E, the United States of America named in its Complaint as Defendants all persons who could possibly claim ownership to the tracts located within the Disputed Property.

The named Defendants included Johnny Maxine Bradley and her husband, Karl Bradley (Petitioners); Walter Clay Mynhier (deceased) and his wife, Margaret Mynhier; Farris H. Gillespie (Respondent) and his wife, Ruby Gillespie (deceased); Herman Robinson (deceased) and his wife, Juanita Robinson (Respondent), and others not germane to the matter before this Court. The Complaint filed by the United States of America also specifically identified Deeds related to the Disputed Property.

Immediately upon filing the Complaint in Condemnation, the United States of America filed its Declaration of Taking on June 28, 1974. This procedure is authorized pursuant to 40 U.S.C. §258a. In this case, the Judgment on the Declaration of Taking was entered on July 1, 1974, thereby authorizing title in the United States for the three tracts of land (3204, 3204E and 3322E).

On or about July 26, 1974, copies of the Notice of Condemnation and the Judgment on the Declaration of Taking were personally served upon the Gillespies (Respondent). The same Notice and Judgment were also personally served on the Robinsons (Respondent) on or about July 10, 1974. Even though all the Defendants in the Federal Condemnation Proceeding, including the Respondents, were served, only the Bradleys (Petitioners) and the Mynhiers entered any appearance in the Federal Condemnation Proceeding.

On or about September 25, 1975, a Motion was made to disburse to the Bradleys (Petitioners) and the Mynhiers the funds deposited by the United States for compensation for Tracts 3204 and 3204E when it filed the Declaration of Taking. On October 10, 1975, the Court ordered the disbursement of $17,550.00 to the Bradleys (Petitioners) and the Mynhiers for compensation for the taking of Tracts 3204 and 3204E. As previously noted, Tract 3204E was categorically located within the Disputed Property and based on the same source of title as the rest of the property.

On October 21, 1976, a Certificate of Publication and Mailing was filed which indicated that Notices of the Condemnation Proceeding had been published for at least three consecutive weeks in the *Clay City Times*, the weekly newspaper of general circulation in Menifee County, Kentucky, in which the Respondents resided. The publication specifically gave Notice that the United States sought to condemn or take Tract 3322E and that this tract was included in portions of the Disputed Property.

In November 1976, the Court in the Federal Condemnation Proceeding referred the matter to the United States Magistrate for a Report and Recommendation. On December 10, 1976, an Order was entered scheduling a pretrial conference before the Magistrate on

January 18, 1977. This Order indicates that it was distributed to Respondents.

On March 10, 1977, a hearing was held before the Land Commissioners on this issue of compensation due for the diminution (i.e. damages) sustained from the taking of Tracts 3204, 3204E and 3322E. Petitioners retained counsel and offered expert testimony on the damages they sustained to all of the property from the takings. As previously indicated, Respondents did not appear and offered no proof or evidence.

On April 1, 1977, Petitioners et al. filed a Motion for Judgment to be declared full owners of Tract 3322 E. The Motion noted that Respondents had failed to appear and waived any claim they had to real estate located on Tract 3322E.

The Report and Recommendation of the Land Commissioners was filed April 25, 1977. In the Report, the Land Commissioners examined and determined the value of all the Disputed Property before and after the taking of the two tracts located internally within the Disputed Property. The Land Commissioners further considered evidence of the substantial improvements made by the Petitioners to areas within the Disputed Property and adjacent but not within the two tracts (3204E and 3322E) including construction of a new residence. The Land Commissioners concluded that "before the taking the 57.05 acres had a fair reasonable market values of ... $79,214.00 ... and after the taking the 18.36 acres which remained had a value of $57,050.00, leaving a difference in before and after-taking values of $22,164.00."

On May 16, 1977, the Court signed an Order adopting the Report of the Land Commissioners. This Order (entered on May 17, 1977) also ordered Respondents to serve and file any response they had to Petitioners' et al. Motion for Judgment within 20 days. This Order indicates that it was served on May 18, 1977, by the Federal Court Clerk to the Respondents.

On May 16, 1977, Judgment was also entered that additional compensation was due for the taking of all three tracts. This Judgment was also served upon the Respondents.

No response was ever filed by the Respondents. Thus, on June 29, 1977, the United States moved to distribute the additional funds deposited in the registry of the Court as assessed by the May 16, 1977 Judgment. On June 30, 1977, the Court in the Federal Condemnation Proceeding ordered disbursement of the additional funds to the Petitioners et al. On July 11, 1977, the United States filed a Motion and Order indicating that "just compensation has been determined and paid for the taking of all interests in and to the property condemned in this Civil Action and that nothing further remains to be done."

On July 27, 1990, Respondents filed suit (Menifee Circuit Court Civil Action File No. 90-CI-9055) against Petitioners et al., including individuals possessing no present possessory or future interests in the Disputed Property. In addition, Respondents' suit was predicated on an inaccurate, fraudulently or grossly negligently drafted deed that purports to vest ownership in Respondents of lands taken in the prior Federal Condemnation Action by the United States of America to remaining land which comprised a portion of the unitary tract whose res the United States took control of in determining the award of damages in this partial-taking case. [74-54]

Petitioners et al. filed an Answer and Counterclaim dated August 14, 1990. Petitioners did not file a Motion for Summary Judgment predicated on their res judicata defense in the State Court, but filed a Complaint against Respondents on November 19, 1990, pursuant to 28 U.S.C. §§ 2283 and 1331, seeking *inter alia* an injunction against Respondents' State Court suit. Petitioners, therefore, meet the exception set forth by this Court in *Parsons Steel, Inc. v. First Alabama Bank*, 474 U.S. 518, 106 S.Ct. 768, 772, 88 L.Ed. 877 (1986).

On December 18, 1990, Petitioners filed a Motion for Partial Summary Judgment with the District Court.

On March 27, 1991, Petitioners moved the District Court pursuant to Fed. R. Civ. Proc. 19(a) to add the United States of America as an involuntary plaintiff.

On April 11, 1991, the District Court issued its Opinion and Order denying Petitioners' Motion for Partial Summary Judgment, denying Petitioners' motion to add the United States as an involuntary plaintiff, and granting the Respondents' Motion for Summary Judgment (Appendix D).

A Notice of Appeal was filed on May 6, 1991 (Appendix F).

Petitioners argued before the U.S. Court of Appeals for the Sixth Circuit that (1) entry of an Injunction of the State Court Action is necessary to aid the jurisdiction of the Federal Court; (2) entry of an Injunction of the State Court Action is required in order for the District Court to protect or effectuate its judgment in the Federal Condemnation Proceeding; (3) the Anti-Injunction Act provides jurisdiction for Federal Courts to enforce and protect their prior judgments; (4) Fed. R. Civ. P. Rule 71A provides no relief to Respondents with respect to the Anti-Injunction Act; and (5) the District Court erred as a matter of law in failing to grant Petitioners' Motion to add the United States of America as an involuntary plaintiff.

The Sixth Circuit held that it "[agreed] with the district court that the 'in aid of jurisdiction' exception does not apply in this case."

Bradley v. Robinson, No. 91-5562 at 7. "The other exception to the Anti-Injunction Act offered by [Petitioners] is of greater merit, but also ultimately fails." *Id.* at 7. "[Petitioners'] res judicata claims are not necessarily without merit, yet 'the proper forum for a complete investigation of the res judicata effects of the district court's judgment is the state court' which remains fully competent and able to resolve the issue." *Bradley v. Robinson*, No. 91-5562 at 9 (quoting *Staffer v. Bouchard Transp. Co.*, 878 F.2d 638, 643 (2d Cir. 1989)).

On May 8, 1992, the United States Court of Appeals for the Sixth Circuit denied Petitioners' petition for rehearing en banc (Appendix I).

On May 28, 1992, the U.S. Court of Appeals for the Sixth Circuit granted Petitioners' motion to stay the mandate (Appendix J).

REASONS FOR GRANTING THE WRIT

Certiorari should be granted for three reasons: This Petition presents an issue upon which the U.S. Court of Appeals for the Sixth Circuit "has so far departed from the accepted and usual course of judicial proceedings ... as to call for an exercise of this Court's power of supervision;" the Court below "decided an important question of federal law which has not been settled by this Court;" and the Opinion below conflicts with previous decisions of this Court, as well as decisions of other Circuits, on these same issues. Unequivocal direction from the High Court is clearly warranted.

Rule 19(a) of the F.R.C.P. *mandates* that a person shall be joined as a party if complete relief cannot be granted in the person's absence, or if the person claims an interest relating to the subject of the matter. Rule 19(a) further notes that such a person may be made an involuntary plaintiff *if he should refuse* to join.

Since the United States of America does, in fact, have an interest relating to the subject matter of this action, the United States of America *must* be joined as an involuntary plaintiff in order to afford *complete* relief to all parties involved.

The District Court denied Petitioners' Motion to add the United States of America as an involuntary plaintiff. No rationale or legal authorities were offered. The Sixth Circuit ignored this issue in the Opinion below, and further refused to grant a rehearing on this issue, et al. This departure by the Sixth Circuit "from the accepted and usual course of judicial proceedings" has denied Petitioners any opportunity for complete relief to be afforded them in their efforts to defend their ancestral land for the second time from Respondents' baseless claims.

This Court has historically held that "the res judicata consequences of a final unappealed judgment on the merits [are not] altered

by the fact that the judgment may have been wrong or rested on a legal principle subsequently overruled in another case." *Federated Department Stores, Inc. v. Moitie*, 452 U.S. 398, 101 S.Ct. 2428, 69 L.Ed. ___ (1981).

The Respondents argued in their District Court Memorandum that *Federated Department Stores, Inc. v. Moitie* had been "*impliedly* [emphasis added] overruled" by this Honorable Court's holding in *Chick Kam Choo v. Exxon Corp.*, 486 U.S. 140, 146 (1988). The District Court held that "[a]s the [Respondents] point out ... the Supreme Court held that 'an essential prerequisite for applying the relitigation exception is that the claims or issues which the federal injunction insulates from litigation in state proceedings actually have been decided by the federal court.'" *Id.* at 148. The Sixth Circuit held that "[i]n *Chick Kam Choo v. Exxon Corp.*, 486 U.S. 140 (1988), the Supreme Court set forth some standards for application of the relitigation exception." *Bradley v. Robinson*, 91-5562.

In *Federated Department Stores, Inc. v. Moitie*, 452 U.S. 398 (1981) (quoting *Commissioner v. Sunnen*, 333 U.S. 591, 597 (1948); *Cromwell v. County of Sac*, 94 U.S. 351, 352-363 (1877)), the Honorable Court held that "[t]here is little to be added to the doctrine of res judicata as developed in the case law of this Court. A final judgment on the merits of an action precludes the parties or their privies from relitigating issues that were *or could have been* [emphasis added] raised in that action."

"There is simply 'no principle of law or equity which sanctions the rejection by a federal court of the salutary principle of res judicata.'" *Id.* (quoting *Heiser v. Woodruff*, 327 U.S. 733, 736 (1946)). "*Nor are the res judicata consequences of a final unappealed judgment on the merits altered by the fact that the judgment on the merits may have been wrong or rested on a legal principle subsequently overruled in another case* [emphasis added]." *Baldwin v. Traveling Men's Assn.*, 283 U.S. 522 (1931); *Angel v. Bullington*, 330 U.S. 183, 187 (1947); *Chicot County Drainage District v. Baxter State Bank*, 308 U.S. 371 (1940); *Wilson's Executor v. Deen*, 121 U.S. 525, 534 (1887).

The Sixth Circuit implicitly accepted Respondents' argument that this Honorable Court in *Chick Kam Choo* has overruled the holding in *Federated Department Stores, Inc. v. Moitie*, 452 U.S. 398 (1981). The Sixth Circuit's holding below completely obliterates this Honorable Court's long-standing doctrine that "the res judicata consequences of a final unappealed judgment on the merits are not altered by the fact that the judgment may have been wrong or rested on a legal principle subsequently overruled in another case." *Id.*

If the breadth of the res judicata principle reaffirmed by this Court in *Federated Department Stores, Inc.* has, indeed, been narrowed in *Chick Kam Choo*, nevertheless this ruling was made subsequent to the federal district court's decision in the Federal Condemnation Proceeding, No. 74-54. *See Baldwin v. Traveling Men's Assn.*, 283 U.S. 552, 525 (1931); *Chicot County Drainage District v. Baxter State Bank*, 308 U.S. 371 (1940); *Wilson's Executor v. Deen*, 121 U.S. 525, 534 (1887).

Unless the *Chick Kam Choo* decision by this Court has, in fact, *completely* overruled the *entire* breadth of the holding in *Federated Department Stores, Inc.*, then Respondents should be rightfully barred from relitigating "issues that were *or could have been* [emphasis added] raised [in the 1974 Federal Condemnation Proceeding, CA 74-54]." *See, e.g., Federated Department Stores, Inc. v. Moitie*, 452 U.S. 398 (1981); *Baldwin v. Traveling Men's Assn.*, 283 U.S. 522 (1931); *Angel v. Bullington*, 330 U.S. 183, 187 (1947).

The important federal question necessarily decided in the Sixth Circuit Opinion below that this Court in *Chick Kam Choo* overruled and completely "swept away" the *entire* holding in *Federated Department Stores, Inc.* was *wrongly* decided. Petitioners respectfully request that this Honorable Court reaffirm the viability of this fundamental doctrine, and further elaborate as to its parameters.

The Opinion of the Sixth Circuit below creates a conflict among the Circuits with regard to whether the issue of ownership to a unitary tract of land must *necessarily* have been decided in determining the award of damages in a partial-taking case.

The Sixth Circuit ignored the existence of certain legally mandated procedures followed by the Land Commissioners in the Federal Condemnation Proceeding, i.e. in the partial-taking case No. 74-54. The appropriate measure of damages is the difference between the value of the parent tract *before* the taking and its value *after* taking. *United States v. Virginia Electric Co.*, 365 U.S. 624, 632, 81 S.Ct. 784, 790, 5 L.Ed.2d 838 (1961); *United States v. 8.41 Acres of Land, More or Less*, 680 F.2d 388, 392 (5th Cir. 1982).

Damages, however, for a partial-taking may be awarded *only* where there exists a unity of ownership between the parent tract and the smaller parcels. *See United States v. 50.50 Acres of Land*, 931 F.2d 1349, 1359 (9th Cir. 1991); *United States v. 429.50 Acres of Land*, 612 F.2d 459, 464 (9th Cir. 1980).

The Sixth Circuit "[agreed] with the District Court that the 'in aid of jurisdiction' exception does not apply in this case." *Bradley v. Robinson*, 91-5562. In contrast to the Opinion of the Sixth Circuit below that affirmed the District Court's Opinion was predicated on the false premise that no unity of title must exist in a partial-taking case.

However, the same District Court in the 74-54 Federal Condemnation Proceeding in 1974 followed the prevailing rule enunciated by the Honorable Court, as well as other Circuits. In sum, the District Court in the 1974 Federal Condemnation Proceeding determined in its Judgment the proper award of payment to Petitioners for the diminution in value of the whole 57.05 acres from the taking of Tracts 3204E and 3322E, and *necessarily* that the *Petitioners were the owners of all of the parent tract based on the same source of title.*

The Opinion below of the Sixth Circuit conflicts with decisions of this Court and creates conflict between the Circuits with regard to whether the equitable remedy of injunction is the *only* adequate remedy to restrain vexations, harassing relitigation, and to effectuate and protect previously acquired in rem jurisdiction. As Justice Reed said in his *Toucey* dissent, the alternative to allowing such injunctions "is that a federal judgment entered perhaps after years of expense in money and energy and after the production of thousands of pages of evidence comes to nothing that is final. It is to be *only* [emphasis added] the basis for a plea of res judicata...." *Samuel C. Ennis & Co., Inc. v. Woodmar Realty Co.*, 542 F.2d 45 (7th Cir. 1976) (quoting *Toucey* dissent at 314 U.S. 144 (1941)).

The law is clear that federal courts do have jurisdiction to enjoin state court proceedings when such a state court proceeding could nullify a prior federal judgment. *Local Loan Co. v. Hunt*, 292 U.S. 234, 239, 54 S.Ct. 695, 697, 78 L.Ed. 1230 (1934) (holding that "a federal court of equity has jurisdiction ancillary to an original case for proceeding in the same court, whether at law or in equity, to secure or preserve the fruits and advantages of a judgment or decree rendered therein"); *Dugas v. American Surety Co.*, 300 U.S. 414, 428, 57 S.Ct. 515, 521, 81 L.Ed. 720 (1937) (no requirement for independent jurisdiction because the court's jurisdiction to issue an injunction under §2283 is ancillary to its jurisdiction in the underlying case). *See also Samuel C. Ennis & Company v. Woodmar Realty Co.*, 542 F.2d 45, 48 (7th Cir. 1976); *see also generally* 17 C. Wright & A. Miller, *Federal Practice and Procedure: Jurisdiction 2d* §4226 at 547-48 (1988) (stating that "[n]o independent basis of jurisdiction is required for a federal court to entertain an application to enjoin relitigation in state court. This is thought to be within the ancillary jurisdiction of the federal court.")

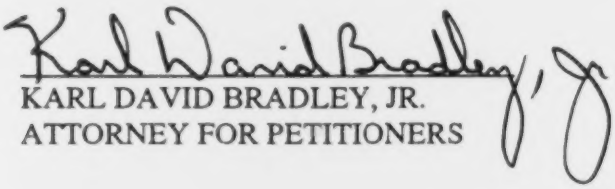
The inequity of forcing Petitioners to litigate a complex federal res judicata matter on an accelerated Economical Litigation Docket in a legally incompetent forum in order to obtain a wholly inadequate remedy which will *not* protect their cherished ancestral property from additional harassing lawsuits by Respondents undermines the equitable aim of our system of jurisprudence.

CONCLUSION

For the reasons set forth above, a Writ of Certiorari should issue to review the Judgment and Opinion of the Sixth Circuit Court of Appeals in this matter.

Dated June 24, 1992.

Respectfully submitted,



KARL DAVID BRADLEY, JR.
ATTORNEY FOR PETITIONERS

KARL BRADLEY and JOHNNY M. BRADLEY, Plaintiffs-Appellants, v. ASA R. LITTLE, FARRIS H. GILLESPIE and JUANITA ROBINSON, Defendants-Appellees, and J.M. RICHARDSON, Defendant

APPEAL FROM UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

No. 91-5562. Filed March 27, 1992. Leonard Green, Clerk.

Before: RYAN and SUHRHEINRICH, Circuit Judges; and CHURCHILL, Senior District Judge *

RYAN, Circuit Judge. Plaintiffs in this federal action seek to enjoin a state court proceeding instituted by defendants to quiet title to a 5.94-acre area of land. The issue on appeal is whether the district court properly dismissed plaintiffs' suit on a motion for summary judgment for lack of jurisdiction under the Anti-Injunction Act, 28 U.S.C. §2283. We conclude that the district court correctly interpreted the Anti-Injunction Act and properly dismissed this action for lack of jurisdiction.

I.

In 1944, the government deemed approximately 57 acres to James Mynhier, the grandfather of plaintiff Johnny Mynhier Bradley. In 1955, E.H. and Emma Robinson conveyed the land directly north of the Mynhiers to their son and daughter-in-law, defendants Herman and Juanita Robinson. The property descriptions in the 1955 Robinson deed matched the calls and boundary descriptions of the 1944 Mynhier deed.

In 1969, the Robinsons purported to convey a one-half undivided interest in their property to co-defendants Farris H. and Ruby Gillespie. This deed was prepared by another defendant, Asa Little, a lawyer in Menifee County who had been hired by the United States Army Corp of Engineers in the years prior to check and certify titles for the acquisition of property for the construction of the Cave Run Lake.

* The Honorable James P. Churchill, Senior District Judge of the United States District Court for the Eastern District of Michigan, sitting by designation.

APPENDIX A

The description of the southern boundary in this 1969 deed did not match the 1955 deed. Instead, it purported to convey property up to 550 feet to the south of the earlier boundary line. Apparently, this confusion stemmed from the use of a map which Little had previously used in connection with his duties under the contract with the Army Corp of Engineers.

In 1973, Mr. and Mrs. John L. Mynhier also hired Asa Little to convey their property to their daughter and son, plaintiff Johnny Mynhier Bradley and Walter Clay Mynhier, respectively. Little apparently again used the Army map for reference rather than the earlier 1944 Mynhier deed. According to Little, he furnished Mr. Mynhier with the Army map and conveyed property as it was identified by Mr. Mynhier. According to the 1973 Mynhier/Bradley deed, the northern boundary line of the Mynhier/Bradley property matched the description of the southern boundary line of the 1969 Robinson/Gillespie deed, setting the boundary between the properties at approximately 550 feet to the south of the boundary line as described in the 1944 Mynhier and 1955 Robinson deeds. Part of the land in dispute in the current state court proceeding is included in the 1969 Robinson/Gillespie deed and excluded from the 1973 Mynhier/ Bradley deed.

In 1974, the government commenced a federal condemnation action to acquire a fee title and perpetual easements over three tracts of land: tracts 3204, 3204E, and 3322E. The government named all who they believed could potentially claim ownership to the condemned tracts of land. As to tracts 3204 and 3204E, only the Mynhiers and Bradleys were informed. The government referred to the ownership of these tracts as stemming from the 1973 Mynhier/Bradley deed. As to tract 3322E, the government's complaint issued notice to the Bradleys, Mynhiers, Gillespies, Robinsons, and others not parties to the current litigation, expressly noting the intent of its description to include "part of the disputed boundary" of several deeds, including the 1973 Mynhier/Bradley and 1969 Robinson/Gillespie deeds: Tract 3322E contained approximately 0.76 acres.

The Mynhiers and Bradleys were the only parties to appear at the condemnation proceedings. On March 31, 1977, the Mynhiers and Bradleys moved for judgment "to declare [them] as full owners of that real estate described herein known as 'Tract No. 3322E.'" The panel of land commissioners, in their report to the court dated April 8, 1977, mentioned the motion by the Mynhiers and Bradleys for judgment,

but referred determination of the question to the court. In their findings of fact, the land commissioners stated: "The owners of said real estate at the time of taking were Walter Clay Mynhier and Margaret Mynhier, his wife, and Johnny Maxine Bradley and Karl Bradley, her husband. Herman Robinson and Juanita Robinson, his wife, and Farris H. Gillespie and Ruby Gillespie, his wife, and the unknown heirs of Julia Haig may have an interest in the property."

The condemnation court's judgment dated May 16, 1977, adopts the report of the land commissioners in all respects, but does not address the motion of the Mynhiers and Bradleys to be named full owners of tract 3322E. By an order of the court also dated May 16, 1977, however, the Robinsons and Gillespies, and all other interested parties, were given 20 days to respond to the Mynhiers/Bradleys' motion for judgment. No response was filed. On June 30, 1977, funds amounting to $22,164.00 were disbursed to the Mynhiers and Bradleys.

In July 1990, the Robinsons and Gillespies initiated a Kentucky state court quiet title action, alleging ownership of part of the land subject to disputed boundaries based on deed and/or adverse possession claims. In November 1990, the Bradleys brought this federal action to enjoin the state court proceedings. The Bradleys also sought compensatory and punitive damages for the alleged professional malpractice of Little and "bad faith" initiation of legal proceedings brought to harass them and slander their title. The district court granted the defendants' motion for summary judgment, dismissing the Bradleys' federal action for lack of jurisdiction under the Anti-Injunction Act.

II.

The Anti-Injunction Act provides:

> A court of the United States may not grant an injunction to stay proceedings in a State court except as expressly authorized by Act of Congress, or where necessary in aid of its jurisdiction, or to protect or effectuate its judgments.

28 U.S.C. §2283. The purpose of the Act is to avoid "the inevitable friction between the state and federal courts that ensues from the injunction of state judicial proceedings by a federal court." *Vendo Co. v. Lektro-Vend Corp.*, 433 U.S. 623, 630-31 (1977). It is an absolute prohibition against any injunction of any state-court proceedings unless the injunction falls within one of the three specifically defined exceptions. *Id.* at 630. The Supreme Court has recognized that the Act is to be construed strictly: "Any doubts as to the propriety of a federal

injunction should be resolved in favor of permitting state courts to proceed in an orderly fashion to finally determine the controversy." *Atlantic Coast Line R.R. Co. v. Brotherhood of Locomotive Eng'rs.*, 398 U.S. 281, 297 (1970).

Plaintiffs seek injunctive relief under the Act's second and third exceptions, arguing that a federal court injunction against the state court proceedings is necessary "in aid of [the federal court's] jurisdiction" and "to protect or effectuate [the federal court's] judgments." The jurisdiction of the federal courts and the availability of injunctive relief under the Anti-Injunction Act in these circumstances are questions of law. Therefore, our standard of review is de novo. *McBee v. Abramajtys*, 929 F.2d 264, 266 (6th Cir. 1991).

The district court summarily dismissed plaintiffs' arguments under the "in aid of jurisdiction" exception as "baseless," though no analysis was provided. On appeal, plaintiffs pursue this theory more vigorously, arguing that the "in aid of jurisdiction" exception applies to in rem actions such as the 1974-1977 federal condemnation proceedings; that the federal court had jurisdiction over the now-disputed lands subject to the state court action and considered the issue of title to that land; and that an injunction by the federal court is required in order to aid the court "in its continued jurisdiction over the res."

This argument is without merit. The "in aid of jurisdiction" exception expresses the rule that if an action is in rem, the court first obtaining jurisdiction over the res may enjoin suits in other courts involving the same res. *See Vendo*, 433 U.S. at 642 (citing *Toucey v. New York Life Ins. Co.*, 314 U.S. 118, 134-135 (1941)). Plaintiffs' assertion that the federal court maintains "continued jurisdiction over the res," however, is offered without citation to authority and is simply mistaken. There are no concurrent federal and state proceedings involving the same res, nor any continuing jurisdiction or supervision by the federal court of its prior judgment. Plaintiffs do not explain how the state court's resolution of the title dispute will disturb the federal court disposition in the prior condemnation proceeding, *cf. United States v. 22,680 Acres of Land*, 438 F.2d 75, 77 (5th Cir. 1971), nor do they show the existence of an "irreconcilable conflict" between the federal and state courts. *See Signal Properties, Inc. v. Farha*, 482 F.2d 1136, 1137 (5th Cir. 1973). We agree with the district court that the "in aid of jurisdiction" exception does not apply in this case.

The other exception to the Anti-Injunction Act offered by Plaintiffs is of greater merit, but also ultimately fails. The so-called "relitigation" exception allows for federal court jurisdiction where "necessary ... to protect or effectuate its judgments" and permits, but does not require, injunctive actions against state judicial proceedings to avoid the relitigation of matters already presented to and decided by a federal court. In *Chick Kam Choo v. Exxon Corp.*, 486 U.S. 140 (1988), the Supreme Court set forth some standards for application of the relitigation exception. "[A]n essential prerequisite for applying the relitigation exception is that the claims or issues which the federal injunction insulates from litigation actually have been decided by the federal court." *Id.* at 148. The federal courts' review of the prior litigation must be "strict and narrow" and confined to "assess[ing] the precise state of the record and what the earlier federal order *actually* said; it [does] not permit the [federal] court to render a post hoc judgment as to what the order was *intended* to say." *Id.* (emphasis in original).

Plaintiffs' relitigation argument is founded on the assertion that the issue of title to the 5.94 acres of land currently disputed in the state court action was necessarily decided by the federal court in condemnation. Plaintiffs argue that the ownership of the disputed land was necessarily at issue in the condemnation proceedings because it may be traced to the source of title (the 1944 Mynhier deed) as tract 3322E. Further, they contend that because they were compensated for the taking of tract 3322E, the condemnation court decided the disputed boundary issue in their favor.

The defendants argue that the question of ownership of the disputed land was never at issue in the condemnation proceedings, as the 5.94 acres were not included in the description of any of the properties taken by the United States in the condemnation proceedings. Moreover, defendants argue, the issue of ownership to tract 3322E, while raised before the land commissioners, was never specifically or necessarily addressed or decided by the court in condemnation.

We are satisfied, upon review of the record, that the issues presented in the current state court action were never decided by the federal court in the condemnation proceedings. The task is to determine what the earlier federal order actually said. *Chick Kam Choo*, 486 U.S. at 148. We are not persuaded that title to the disputed land was expressly or necessarily decided in the condemnation action.

Moreover, the adverse possession claims could not even have been considered in 1977. Thus, plaintiffs fail to make the "strong and unequivocal showing of relitigation of the same issue" necessary "to overcome the federal courts' proper disinclination to intermeddle in state court proceedings." *De Cosme v. Sea Containers, Ltd.*, 874 F.2d 66, 68 (1st Cir. 1989) (quoting *Southern California Petroleum Corp. v. Harper*, 273 F.2d 715, 719 (5th Cir. 1960)). Plaintiffs' res judicata claims are not necessarily without merit, yet "the proper forum for a complete investigation of the res judicata effects of the district court's judgment is the state court," which remains fully competent and able to resolve the issue. *Staffer v. Bouchard Transp. Co.*, 878 F.2d 638, 643 (2d Cir. 1989).

III.

The district court did not abuse its discretion in refusing to grant an injunction against the state court proceeding, nor did it err in dismissing the complaint in this case for lack of jurisdiction under the Anti-Injunction Act.

For the foregoing reasons, we **AFFIRM.**

JOHNNY MYNHIER BRADLEY and KARL BRADLEY, her husband, Plaintiffs, v. JUANITA ROBINSON, FARRIS H. GILLESPIE, ASA R. LITTLE, JR., and J.M. RICHARDSON in his capacity as JUDGE, MENIFEE CIRCUIT COURT, Defendants

ORDER FROM UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF KENTUCKY

No. 90-516. Filed February 5, 1991. Leslie G. Whitmer, Clerk.

On motion of David N. Shattuck to withdraw as attorney for Plaintiffs, and the Court being sufficiently advised, it is hereby ORDERED that said motion should be and is hereby SUSTAINED.

Entered this the 5th day of February, 1991.

_____

JUDGE,
UNITED STATES DISTRICT COURT

TENDERED BY:

_____

DAVID N. SHATTUCK

APPENDIX B

JOHNNY MYNHIER BRADLEY, et al., Plaintiffs,
v. JUANITA ROBINSON, et al., Defendants

ORDER FROM UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF KENTUCKY

No. 90-516. Filed February 5, 1991. Leslie G. Whitmer, Clerk.

This matter is before the court upon the motion of plaintiffs to voluntarily dismiss defendant J.M. Richardson, in his capacity as Judge of Menifee Circuit Court. Therefore, it is hereby ORDERED that the motion is GRANTED, and defendant J.M. Richardson is DISMISSED as a defendant to this action.

Entered this the 5th day of February, 1991.

KARL S. FORESTER, JUDGE

APPENDIX C

JOHNNY MYNHIER BRADLEY, et al., Plaintiffs
v. JUANITA ROBINSON, et al., Defendants

OPINION AND ORDER FROM UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF KENTUCKY

No. 90-516. Filed April 11, 1991. Leslie G. Whitmer, Clerk.

This matter is before the Court upon the plaintiffs' motion for partial summary judgment and to add the United States as an involuntary plaintiff. The defendants move to dismiss or for summary judgment for lack of jurisdiction.

In their complaint, the plaintiffs seek an injunction barring the defendants from litigating a claim in Menifee Circuit Court concerning a tract of land in Menifee County, Kentucky. They also assert several state law claims. They contend that they became the owners of the disputed tract through a condemnation action that the United States filed in this Court in 1974. They state that this Court has federal question jurisdiction to enter an injunction.

In their motion for partial summary judgment, the plaintiffs contend that they are entitled to an injunction as a matter of law to enjoin the defendants from challenging their ownership of the tract of land. Although discerning the plaintiffs' arguments in their convoluted and rambling memoranda is rather difficult, they apparently contend that the federal condemnation action bars the current Menifee Circuit Court litigation based on the doctrine of res judicata.

The defendants respond by contending that they are entitled to a dismissal or to summary judgment because the Anti-Injunction Act forbids this Court from enjoining proceedings in state courts. The Act provides: "A court of the United States may not grant an injunction to stay proceedings in a State Court except as expressly authorized by Act of Congress, or where necessary in aid of its jurisdiction, or to protect or effectuate its judgments." 28 U.S.C. §2283. The plaintiffs attempt to invoke the relitigation exception, the Act's third exception, in support of their injunction claim.

APPENDIX D

In *Chick Kam Choo v. Exxon Corp.*, 486 U.S. 140, 146 (1988), the United States Supreme Court explained: "The relitigation exception was designed to permit a federal court to prevent state litigation of an issue that previously was presented to and decided by the federal court. It is founded in the well-recognized concepts of res judicata and collateral estoppel." As the defendants point out, however, the Supreme Court held that "an essential prerequisite for applying the relitigation exception is that the claims or issues which the federal injunction insulates from litigation in state proceedings actually have been decided by the federal court." *Id.* at 148.

The defendants attached exhibits to their motion that demonstrate that the parties in the prior federal condemnation action did not actually litigate the title to the disputed tract of land. In their reply, the plaintiffs do not contend that this Court actually decided the title ownership issue in the condemnation action. Rather, they argue that this Court is not bound to follow the *Chick Kam Choo* case because the Supreme Court granted certiorari in that case to resolve a conflict between the Fifth and Ninth Circuits without concerning any cases from the Sixth Circuit. The plaintiffs' argument that this Court can ignore Supreme Court precedent is, of course, completely without merit. They also make baseless arguments that their injunction claim falls under other exceptions to the Anti-Injunction Act.

This Court holds that the Anti-Injunction Act forbids enjoining the Menifee Circuit Court litigation and that no exception to the Act applies. This Court also has no jurisdictional basis to consider the plaintiffs' remaining state law claims. The plaintiffs must assert their res judicata arguments and state law claims in state court. Summary judgment is appropriate if the moving party establishes that there is no genuine issue of material fact for trial and that he is entitled to judgment as a matter of law. Fed.R.Civ.P. 56(c); *see Celotex Corp. v. Catrett*, 477 U.S. 317 (1986). The defendants, therefore, are entitled to summary judgment.

The Court being well and sufficiently advised, it is hereby ORDERED:

(1) that the plaintiffs' motion for partial summary judgment is DENIED;

(2) that the plaintiffs' motion to add the United States as an involuntary plaintiff is DENIED; and

(3) that the defendants' motion for summary judgment is GRANTED, and summary judgment will be entered contemporaneously with this opinion and order in favor of the defendants.

On this 11th day of April, 1991.

KARL S. FORESTER, JUDGE

JOHNNY MYNHIER BRADLEY, et al., Plaintiffs
v. JUANITA ROBINSON, et al., Defendants

SUMMARY JUDGMENT FROM UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF KENTUCKY

No. 90-516. Filed April 11, 1991. Leslie G. Whitmer, Clerk.

In accordance with the memorandum opinion entered contemporaneously with this summary judgment, it is hereby ORDERED:

(1) that the defendants' motion for summary judgment is GRANTED, and summary judgment is entered in favor of the defendants;

(2) that this matter is DISMISSED WITH PREJUDICE;

(3) that this judgment is final and appealable, and no just cause for delay exists; and

(4) that this matter is STRICKEN from the active docket.

On this 11th day of April, 1991.

KARL S. FORESTER, JUDGE

APPENDIX E

JOHNNY MYNHIER BRADLEY and KARL BRADLEY, her husband, Plaintiffs, v. JUANITA ROBINSON, FARRIS H. GILLESPIE and ASA R. LITTLE, JR., Defendants

NOTICE OF APPEAL FROM UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF KENTUCKY

No. 90-516. Filed May 6, 1991. Leslie G. Whitmer, Clerk.

Notice is hereby given that Johnny Mynhier Bradley and Karl Bradley, Plaintiffs above named, hereby appeal to the United States Court of Appeals for the Sixth Circuit from the Opinion and Order entered in this Court on April 11, 1991.

On this 6th day of May, 1991.

McBRAYER, McGINNIS, LESLIE & KIRKLAND
163 West Short Street, Suite 400
Lexington, KY 40507
(606) 231-8780

GLENN A. ACREE

APPENDIX F

JOHNNY MYNHIER BRADLEY and KARL BRADLEY, her husband, Plaintiffs-Appellants, v. JUANITA ROBINSON, FARRIS H. GILLESPIE and ASA R. LITTLE, JR., Defendants-Appellees, and J.M. RICHARDSON in his capacity as Judge, Menifee Circuit Court, Defendant

ORDER FROM UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

No. 91-5562. Filed July 24, 1991. Leonard Green, Clerk.

Before: BOGGS, Circuit Judge; LIVELY, Senior Circuit Judge; and CLELAND, District Judge *

The plaintiffs have filed a notice of appeal from the district court's opinion and order granting summary judgment for the defendants in this action to enjoin litigation in state court concerning a tract of land. The district court entered an opinion and order and a separate order of summary judgment on the same day. The defendants move to dismiss the appeal on grounds that the notice of appeal specifies that the opinion and order, not the summary judgment, is being appealed. They assert that the plaintiffs should have appealed from the separate order of summary judgment rather than the order and opinion granting summary judgment. The plaintiffs have responded in opposition to this motion.

The defendants have not shown grounds for dismissal of this appeal. The failure to mention or misidentification of a ruling being appealed does not destroy appellate jurisdiction as long as the intent to appeal is apparent and the appellee suffers no prejudice. *United States v. William*, 804 F.2d 961, 963 (6th Cir. 1986); *see also McLaurin v. Fischer*, 768 F.2d 98, 101-102 (6th Cir. 1985).

It is clear that the plaintiffs here wish to appeal the district court's decision to grant summary judgment in favor of the defendants.

* The Honorable Robert H. Cleland, U.S. District Judge for the Eastern District of Michigan, sitting by designation.

The defendants have not been misled or prejudiced by the notice of appeal. *See Sanabria v. United States*, 437 U.S. 54, 67 n. 21 (1978).

It is therefore ORDERED that the defendants' motion to dismiss this appeal is denied.

ENTERED BY ORDER OF THE COURT

_____

CLERK

JOHNNY MYNHIER BRADLEY and KARL BRADLEY,
her husband, Plaintiffs-Appellants, v. JUANITA ROBINSON,
FARRIS H. GILLESPIE and ASA R. LITTLE, JR.,
Defendants-Appellees, and J.M. RICHARDSON
in his capacity as Judge, Menifee Circuit Court, Defendant

ORDER FROM UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 91-5562. Filed August 19, 1991. Leonard Green, Clerk.

Upon consideration of the motion of Glenn E. Acree to withdraw as counsel for the appellants, it is ORDERED that the motion be and it hereby is GRANTED.

Upon further consideration of the appellants' motion to hold the above cause in abeyance pending retention of substitute counsel, it is ORDERED that the motion be and it hereby is DENIED. The appellants are to advise this court of the name of new counsel or file their brief on or before October 7, 1991. The appellees' brief is now due November 4, 1991, the reply brief November 18, 1991, and the joint appendix November 25, 1991.

ENTERED PURSUANT TO RULE 8(b),
RULES OF THE SIXTH CIRCUIT

_____

CLERK

APPENDIX H

JOHNNY MYNHIER BRADLEY and KARL BRADLEY,
her husband, Plaintiffs-Appellants, v. JUANITA ROBINSON,
FARRIS H. GILLESPIE and ASA R. LITTLE, JR.,
Defendants-Appellees, and J.M. RICHARDSON
in his capacity as Judge, Menifee Circuit Court, Defendant

ORDER FROM UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 91-5562. Filed May 8, 1992. Leonard Green, Clerk.

Before: RYAN and SUHRHEINRICH, Circuit Judges;
and CHURCHILL, District Judge *

The court having received a petition for rehearing en banc, and the petition having been circulated not only to the original panel members but also to all other active judges of this court, and no judge of this court having requested a vote on the suggestion for rehearing en banc, the petition for rehearing has been referred to the original hearing panel.

The panel has further reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case. Accordingly, the petition is denied.

ENTERED BY ORDER OF THE COURT

CLERK

* The Honorable James P. Churchill, District Judge for the Eastern District of Michigan, sitting by designation.

APPENDIX I

JOHNNY MYNHIER BRADLEY and KARL BRADLEY,
her husband, Plaintiffs-Appellants, v. JUANITA ROBINSON,
FARRIS H. GILLESPIE and ASA R. LITTLE, JR.,
Defendants-Appellees, and J.M. RICHARDSON
in his capacity as Judge, Menifee Circuit Court, Defendant

ORDER FROM UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 91-5562. Filed May 28, 1992. Leonard Green, Clerk.

Before: RYAN and SUHRHEINRICH, Circuit Judges;
and CHURCHILL, District Judge *

Upon consideration of the motion to stay the mandate submitted by the appellants,

It is ORDERED that the motion be and it hereby is GRANTED.

ENTERED BY ORDER OF THE COURT

_____

CLERK

* The Honorable James P. Churchill, District Judge for the Eastern District of Michigan, sitting by designation.

APPENDIX J

28 U.S.C. §1254
COURTS OF APPEALS; CERTIORARI;
APPEAL; CERTIFIED QUESTIONS

Cases is the courts of appeals may be reviewed by the Supreme Court by the following methods:

(1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree.

(2) * * * * * * * * * * *

APPENDIX K

28 U.S.C. §1331
FEDERAL QUESTION

The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States.

APPENDIX L

28 U.S.C. §2101
SUPREME COURT; TIME FOR APPEAL OR CERTIORARI; DOCKETING; STAY

(a) * * * * * * * * * *

(b) * * * * * * * * * *

(c) Any other appeal or any writ of certiorari intended to bring any judgment or decree in a civil action, suit or proceeding before the Supreme Court for review shall be taken or applied for within ninety days after the entry of such judgment or decree. A justice of the Supreme Court, for good cause shown, may extend the time for applying for a writ of certiorari for a period not exceeding sixty days.

(d) * * * * * * * * * *

(e) * * * * * * * * * *

(f) In any case in which the final judgment or decree of any court is subject to review by the Supreme Court on writ of certiorari, the execution and enforcement of such judgment or decree may be stayed for a reasonable time to enable the party aggrieved to obtain a writ of certiorari from the Supreme Court. The stay may be granted by a judge of the court rendering the judgment or decree or by a justice of the Supreme Court, and may be conditioned on the giving of security, approved by such judge or justice, that if the aggrieved party fails to make application for such writ within the period allotted therefor, or fails to obtain an order granting his application, or fails to make his plea good in the Supreme Court, he shall answer for all damages and costs which the other party may sustain by reason of the stay.

APPENDIX M

28 U.S.C. §2283
STAY OF STATE COURT PROCEEDINGS

A court of the United States may not grant an injunction to stay proceedings in a State court except ... where necessary in aid of its juris-diction, or to protect or effectuate its judgments.

APPENDIX N

40 U.S.C. §258a
LANDS, EASEMENTS, OR RIGHTS OF WAY FOR PUBLIC USE; TAKING OF POSSESSION AND TITLE IN ADVANCE OF FINAL JUDGMENT; AUTHORITY; PROCEDURE

In any proceeding in any court of the United States outside of the District of Columbia which has been or may be instituted by and in the name of and under the authority of the United States for the acquisition of any land or easement or right of way in land for the public use, the petitioner may file in the cause, with the petition or at any time before judgment, a declaration of taking signed by the authority empowered by law to acquire the lands described in the petition, declaring that said lands are thereby taken for the use of the United States. Said declaration of taking shall contain or have annexed thereto:

(1) A statement of the authority under which and the public use for which said lands are taken.

(2) A description of the lands taken sufficient for the identification thereof.

(3) A statement of the estate or interest in said lands taken for said public use.

(4) A plan showing the lands taken.

(5) A statement of the sum of money estimated by said acquiring authority to be just compensation for the land taken.

Upon the filing said declaration of taking and of the deposit in the court, to the use of the persons entitled thereto, of the amount of the estimated compensation stated in said declaration, title to the said lands in fee simple absolute, or such less estate or interest therein as is specified in said declaration, shall vest in the United States of America, and said lands shall be deemed to be condemned and taken for the use of the United States, and the right to just compensation for the same shall vest in the persons entitled thereto; and said compensation shall be ascertained and awarded in said proceeding and established by judgment therein, and the said judgment shall include,

as part of the just compensation awarded, interest in accordance with section 6 of this Act on the amount finally awarded as the value of the property as of the date of taking, from said date to the date of payment; but interest shall not be allowed on so much thereof as shall have been paid into the court. No sum so paid into the court shall be charged with commissions or poundage.

Upon the application of the parties in interest, the court may order that the money deposited in the court, or any part thereof, be paid forthwith for or on account of the just compensation to be awarded in said proceeding. If the compensation finally awarded in respect of said lands, or any parcel thereof, shall exceed the amount of the money so received by any person entitled, the court shall enter judgment against the United States for the amount of the deficiency.

Upon the filing of a declaration of taking, the court shall have power to fix the time within which and the terms upon which the parties in possession shall be required to surrender possession to the petitioner. The court shall have power to make such orders in respect of encumbrances, liens, rents, taxes, assessments, insurance, and other charges, if any, as shall be just and equitable.

F.R.C.P. RULE 19
JOINDER OF PERSONS NEEDED FOR JUST ADJUDICATION

(a) *Persons to be Joined if Feasible.* A person who is subject to service of process and whose joinder will not deprive the court of jurisdiction over the subject matter of the action shall be joined as a party in the action if (1) in the person's absence, complete relief cannot be accorded among those already parties, or (2) the person claims an interest relating to the subject of the action and is situated that the disposition of the action in the person's absence may (i) as a practical matter impair or impede the person's ability to protect that interest or (ii) leave any of the persons already parties subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations by reason of the claimed interest. If the person has not been so joined, the court shall order that the person be made a party. If the person should join as a plaintiff but refuses to do so, the person may be made a defendant, or, in a proper case, an involuntary plaintiff. If the joined party objects to venue and joinder of that party would render the venue of the action improper, that party shall be dismissed from the action.

F.R.C.P. RULE 71A
CONDEMNATION OF PROPERTY

(a) *Applicability of Other Rules.* The Rules of Civil Procedure for the United States District Courts govern the procedure for the condemnation of real and personal property under the power of eminent domain, except as otherwise provided in this rule.

(b) * * * * * * * * * * *

(c) * * * * * * * * * * *

(d) * * * * * * * * * * *

(e) *Appearance of Answer.* If a defendant has no objection or defense to the taking of the defendant's property, the defendant may serve a notice of appearance designating the property in which the defendant claims to be interested. Thereafter, the defendant shall receive notice of all proceedings affecting it. If a defendant has any objection or defense to the taking of the property, the defendant shall serve an answer within 20 days after the service of notice upon the defendant. The answer shall identify the property in which the defendant claims to have an interest, state the nature and extent of the interest claimed, and state all the defendant's objections and defenses to the taking of the property. A defendant waives all defenses and objections not so presented, but at the trial of the issue of just compensation, whether or not the defendant has previously appeared or answered, the defendant may present evidence as to the amount of the compensation to be paid for the property, and the defendant may share in the distribution of the award. No other pleading or motion asserting any additional defense or objection shall be allowed.

Supreme Court, U.S.
FILED
JUL 24 1992
OFFICE OF THE CLERK

(2)

No. 92-4

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1992

JOHNNY MYNHIER BRADLEY and
KARL BRADLEY . . . . . PETITIONERS

versus

JUANITA ROBINSON,
FARRIS H. GILLESPIE,
and ASA R. LITTLE, JR. . .RESPONDENTS

On Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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No. 92-4

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JUANITA ROBINSON,
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BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

* * * * * * *

STATEMENT OF THE CASE

The Respondents do not accept the Statement of the Case as contained in

Petitioners' Petition for Writ of Certiorari.

In an unpublished Opinion, a panel of the United States Court of Appeals for the Sixth Circuit, held that the District Court for the Eastern District of Kentucky was correct when it dismissed the action of the Plaintiffs (Petitioners herein) for lack of jurisdiction under the Anti-Injunction Act, 28 U.S.C. §2283.[1] The Court, after a careful analysis of the record, specifically held, under *Chick Kam Choo v. Exxon Corporation*, 486 U.S. 140, 100 L.Ed.2d 127, 108 S.Ct. 1684 (1988), that the court in a previous

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[1] The Act provides:

A court of the United States may not grant an injunction to stay proceedings in a state court except as expressly authorized by Act of Congress, or where necessary in aid of its jurisdiction, or to protect or effectuate its judgments.

1974 condemnation case did not decide the issue as to the title of a 5.94 acre tract of land presently being litigated and that the proper forum to present Plaintiffs "res judicata" argument was the state court having jurisdiction over the action to quiet title to the said tract.

This action was filed by the Petitioners seeking to enjoin the Defendants, et al, from proceeding with that state court action to quiet title to the 5.94 acre tract. The state court action involves overlapping boundaries of some 550 feet between adjoining property owners and claims of title by adverse possession for more than fifteen (15) years by each of the parties.

In 1974, the United States Government had commenced a condemnation action to

acquire a fee title and perpetual easements over three (3) tracts of land containing approximately 42 acres. The government named all parties defendants who it believed could potentially claim ownership to the condemned tracts of land. As to two (2) of the tracts, only the Plaintiffs herein were named as claimants. The Defendants herein were named as joint claimants for a .76 acre tract (valued at approximately $100.00), along with the Plaintiffs. The Defendants herein did not enter their appearance and made no claim to the proceeds of the condemnation action. The Bradleys (Plaintiffs) moved for a Judgment in the condemnation action to declare them as full owners of that .76 acre tract, but did not serve the motion upon the Gillespies and Robinsons. The

panel of land commissioners in their report to the Court dated April 8, 1977, mentioned the existence of this motion, but referred the matter to the court for determination. The Court on May 16, 1977 adopted the report of the land commissioners, but did not address the motion to be named full owners of this .76 acre tract. However the Court did give the Robinsons and Gillespies twenty (20) days to respond to this motion. No such response was filed and on June 30, 1977, all funds were disbursed to the Plaintiffs from the Court, but the motion was never ruled on.

In July of 1990, the Robinsons and the Gillespies (Defendants herein) initiated a Kentucky state court action to quiet title to a 5.94 acre tract adjoining the property condemned in 1974, and alleged

ownership subject to the overlapping deeds and by adverse possession for more than fifteen (15) years.

The Plaintiffs (herein) then brought this action in U.S. District Court to enjoin the state court proceedings under the theory that because the 5.94 acres had the alleged same source of title as the .76 acres of condemned property, "res judicata" prevented the determination of ownership of the 5.94 acre tract, and since Defendants had not contested the question as to the .76 acres, they could not contest title to the 5.94 acres now. The District Court dismissed the Plaintiffs' Complaint for lack of jurisdiction and same was affirmed by the United States Court of Appeals for the Sixth Circuit, holding that no exception to the Anti-Injunction Act applied to

this case.

The Sixth Circuit evidently found it unnecessary to reach Plaintiffs' issue regarding joining the United States as a party plaintiff, since the U.S. is not and has not ever made any claim to the 5.94 acre tract presently in dispute. It also did not reach the "res judicata" issue on its merits, including matters argued by the Defendants, such as whether Rule 71A of the Federal Rules of Civil Procedure even permits the claimants in a condemnation action to litigate the title to property not being taken in the condemnation proceeding.

ARGUMENT

I. The Petition does not present an issue upon which the U.S. Court of Appeals for the Sixth Circuit so far departed from

the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision.

At page 6 of the Petition for Writ of Certiorari, the Petitioners complain of the failure of the Sixth Circuit to consider Petitioners' issue regarding joining the United States of America as a party plaintiff. The District Court had previously overruled the Motion.

One answer to Petitioners' argument is quite simply that there was no need to reach the issue of joining the United States of America, once the Court had decided that the Anti-Injunction Act, under *Chick Kam Choo v. Exxon*, 486 U.S. 140 (1988), prohibited the enjoining of the Kentucky state court proceedings and that there was no applicable exception contained therein.

Secondly, the Sixth Circuit did in fact rule on this issue, when it affirmed the District Court. The Sixth Circuit just did not see fit to state its reasons for so ruling.

Furthermore, it is patently obvious that the United States of America is not making any claim concerning the property which is in dispute between the Petitioners and the Respondents. This motion was nothing more than an attempt by the Petitioners to gain a basis for Federal Court jurisdiction in this case, which they never had. The Court of Appeals for the Sixth Circuit was correct in affirming the District Court.

II. The decision below did not decide an important question of federal law which has not been settled by the Supreme

Court.

At pages 6, 7 and 8 of the Petition for Writ of Certiorari, the Petitioners argue that the application of *Chick Kam Choo v. Exxon, supra,* to the facts of this case by the Sixth Circuit in some manner narrows or reduces the previous holding of this court in *Federated Department Stores, Inc. v. Moite,* 452 U.S. 394, 69 L.Ed.2d 103, 101 S.Ct. 2424 (1981). These arguments are incorrect.

Federated, supra, held that the principles of res judicata barred relitigation of an unappealed adverse Judgment, even though that Judgment rested on overruled principle and other similar actions had been successfully appealed. That decision in no way conflicts with the holding in *Chick Kam Choo, supra*.

Chick Kam Choo, supra, held that the

principles of res judicata were not the same as the "relitigation" exception in the Anti-Injunction Act. *Chick Kam Choo* held that an issue had to be in fact litigated and decided by a federal court in order to meet the exception in the Anti-Injunction Act. The principles of res judicata are substantially broader and different, specifically, in that res judicata applies to certain matters that *could have been raised* in prior litigation, but were not. There is absolutely no conflict in the two decisions.

In the first paragraph which begins on page 7 of the Petition, the Petitioners state that the Respondents argued in District Court Memorandum that *Federated Department Stores, Inc., supra,* had been impliedly overruled by *Chick Kam Choo.* That statement is incorrect. The following is a direct

quote of the argument made by Respondents in the District Court Memorandum referred to:

> Some of the cases cited by the Plaintiffs in their Memorandum appear to hold that this Relitigation Exception also covers matters that could have been, but were not actually litigated before the Federal Court. These cases are no longer good law. They were impliedly overruled by the United States Supreme Court in 1988.
>
> In *Chick Kam Choo v. Exxon Corporation*, 486 US 140, 100 L Ed 2d 127, 108 S Ct 1684 (1988), the Supreme Court at page 148 held:
>
> > ..., an essential prerequisite for applying the relitigation exception is that the claims or issues which the federal injunction insulates from litigation in state proceedings actually have been decided by the Federal Court...this prerequisite is strict and narrow (Emphasis added).

The foregoing statement in the District Court Memorandum is correct. This court, in *Chick Kam Choo, supra*,

eliminated a conflict between the circuits as to the breadth of the "relitigation" exception in the Anti-Injunction Act. It did not narrow the principles of res judicata, and Respondents' Memorandum did not say so.[2]

The Petition fails to demonstrate an important question of federal law which has not been settled by this Court.

III. The decision below does not conflict with previous decisions of this court, or with decisions of other circuits on these issues.

At pages 8, 9 and 10 of the Petition, Petitioners argue that some kind of

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[2] Petitioners fail to explain how any argument that might have been made in a District Court Memorandum could have affected the decision of the United States Court of Appeals for the Sixth Circuit.

conflict among the circuits or with cases from the Supreme Court has been created by the decision below. Such arguments are incorrect.

The issues asserted by Petitioners concerning damages in partial-taking cases and the measure of damages reflecting the value of a parent tract before and after the taking were not decided by the United States Court of Appeals for the Sixth Circuit or by the District Court. Those courts found no need to reach those issues,[3] since they found that *Chick Kam Choo, supra*, was applicable. These issues may be appropriate to assert in determining

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[3] See *United States v. Virginia Electric Company*, 365 U.S. 624, 81 S.Ct. 784, 5 L.Ed.2d 838 (1961); *United States v. 8.41 Acres of Land*, 680 F2d 388 (5th Cir. 1982); *United States v. 50.50 Acres of Land*, 931 F2d 1349 (9th Cir. 1991); *United States v. 429.50 Acres of Land*, 612 F2d 459 (9th Cir. 1980).

whether the principles of res judicata apply to this case. However, they have not been passed upon by any court and would certainly be inappropriate for first time determination under a Petition for Writ of Certiorari.

At page 9 of the Petition, Petitioners cite cases holding that federal courts have jurisdiction to enjoin state court proceedings at appropriate times. Respondents have no argument with any of those decisions.[4] In fact, *Samuel C. Ennis & Company v. Woodmar Realty Company*, 542 F.2d 45, 49 (7th Cir. 1976) holds correctly as follows:

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[4] See, *Samuel C. Ennis & Company v. Woodmar Realty Company*, 542 F2d 45 (7th Cir. 1976); *Local Loan Company v. Hunt*, 292 U.S. 234, 54 S.Ct. 695, 78 L.Ed 1230 (1934); *Dugas v. American Surety Company*, 300 U.S. 414, 57 S.Ct. 515, 81 L.Ed 720 (1937).

> We noted earlier that the allegations made in *Woodmar's* state complaint were fully litigated and rejected by the Bankruptcy Court. (Emphasis added).

There is no conflict created by this case, either with prior cases of the Supreme Court or with other circuits.

IV. The United States Court of Appeals for the Sixth Circuit analyzed the record and properly applied the facts to established law.

The record herein consisted not only of the pleadings in the current case, but also included the 1974 condemnation case record. Having analyzed the record, the Sixth Circuit found at pp 7-8:

We are satisfied, upon review of the record, that the issues presented in the current state court action were never decided by the federal court in the condemnation proceedings. The task is to determine what the earlier federal order actually said. *Chick Kam Choo*, 486 U.S. at 148. We are not persuaded that title to the disputed land was expressly or necessarily decided in the condemnation action. Moreover, the adverse possession claims could not even have been

considered in 1977. Thus, plaintiffs fail to make the "strong and unequivocal showing of relitigation of the same issue" necessary "to overcome the federal courts' proper disinclination to intermeddle in state court proceedings". *De Cosme v. Sea Containers, Ltd.*, 874 F.2d 66, 68 (1st Cir. 1989) (quoting *Southern California Petroleum Corp. v. Harper*, 273 F.2d 715, 719 (5th Cir. 1960)). Plaintiffs' res judicata claims are not necessarily without merit, yet "the proper forum for

a complete investigation of the res judicata effects of the district court's judgment is the state court," which remains fully competent and able to resolve the issue. *Staffer v. Bouchard Transp. Co.*, 878 F.2d 638, 643 (2d Cir. 1989).

CONCLUSION

For all of the foregoing reasons, the Petition for Writ of Certiorari should be denied.

RESPECTFULLY SUBMITTED,

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